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NO. ____

In The
Supreme Court Of The United States

TIEN FU HSU, et al.,

Petitioners,

vs.

COUNTY OF CLARK, a political subdivision of the State of Nevada,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of the State of Nevada

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Clark County, Nevada, as owner and operator of the commercial jet airport serving Las Vegas, enacted laws that require property owners adjacent to its airport to set aside large amounts of valuable airspace (the kind of property used by others in the vicinity for the construction of major high rise hotels) to permit the occasional physical use of the airspace by pilots who need a bit more maneuvering room on approach or departure than the airport operator purchased to provide for that purpose.

The question presented is:

When government action requires owners of private property adjoining an airport *to allow aircraft to enter their airspace* on an *ad hoc* basis so that the airspace must be set aside for public use, rather than private development, has the government physically taken property requiring just compensation under the 5th Amendment?

PARTIES TO THE PROCEEDING

The Petitioners are: Tien Fu Hsu, Lisa Su Family Trust, Lisa Su Trustee, Peter B. Liao, West Park, Inc., Lucky Land Company, Lucky Land Company Investments, Lucky Land Company Enterprises Limited Partnership, and West Park Company 1.

No corporate Petitioner has a parent corporation, and no publicly held company owns stock in any Petitioner.

The Respondent is the County of Clark, a political subdivision of the State of Nevada.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Tien Fu Hsu, *et al.* respectfully pray that a Writ of Certiorari issue to review a final judgment of the Supreme Court of the State of Nevada.

OPINIONS BELOW

The decision below was filed on September 30, 2004. (App., p. 1.) A timely Petition for Rehearing was denied in an order filed December 23, 2004. (App., p. 65.) The trial court's opinion finding liability is at App., p. 52. None of these is published.

JURISDICTION

This case involves action by Clark County in direct aid of its own economic interest as proprietor of McCarran International Airport, serving Las Vegas, Nevada. As owner/operator of the airport, Clark County assumed responsibilities that can neither be shunted off to the federal government (as overall regulator of airborne commerce) nor imposed on neighboring property owners. (*Griggs v. Allegheny County*, 369 U.S. 84, 89-90 [1962] [airport operator is Constitutionally responsible for acquiring all property interests necessary for airport to function properly].)

The County adopted regulations requiring the Petitioners to allow random aircraft overflights of their property by jet aircraft using the County's adjacent airport. Absent compensation, that was a naked attempt to have unrelated neighbors shoulder part of the

financial burden of operating this public airport. The trial judge held that requiring them to submit to such random and recurring physical invasions was a *per se* taking of property and a jury awarded compensation.

On appeal, the Nevada Supreme Court reversed. It theorized that — in spite of the regulation's de facto authorization of physical aircraft entry into the Petitioners' airspace — any taking was regulatory, not physical, and was thus subject to more lenient judicial review. (App., p. 1.) Following denial of their timely rehearing petition on December 23, 2004 (App., p. 65), the Petitioners seek this Court's review.

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use without just compensation."

Fourteenth Amendment, United States Constitution, §1:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

State courts are in conflict and disarray over interpretation of the 5th Amendment as it relates to the precise issue presented by this case, i.e., when an airport operator requires owners of land adjoining its airport to leave their own airspace unused for private purposes in order to allow commercial airline pilots to

use that airspace if, as, and when desired, can the airport operator simply commandeer that property interest, or does the 5th Amendment (as applied to the States through the 14th Amendment) require compensation for that taking of property for physical use by the public?

The opinion below explicitly recognizes that the State courts are divided on this issue, as it cites decisions going each way and then aligns Nevada with one group — relegating the conflicting State courts to a "but see" listing in a footnote. (See App., p. 36, n. 88.)

The facts at bench are simple. The Petitioners ("landowners") own some 37 acres of land off the side of Runway 19R/1L at McCarran International Airport in Las Vegas, Nevada. Their land is not in either the approach or departure path for aircraft using the airport, but has been placed by Clark County, the airport's owner/operator, in what the County calls a "transition" zone, an area adjacent to the runway for pilots to use when they are unable to confine the flight of their aircraft within the approach/departure zone acquired by Clark County for the airport and stray off to the side. The trial court summarized the evidence thus:

> "The undisputed testimony of the Airport personnel is that the reason for the height limitations on this property is due to the property's inclusion in a transition zone. The transition zones are zones that are needed by the airport to safely operate and which *can be used by airplanes* when other methods of approach

> and departure are blocked or unusable for whatever reason. *While the airport personnel cannot say how often this space is invaded, they are clear that the space is necessary and that it is used.*" (App., p. 53; emphasis added.)[1]

As shown in an article written after the trial below by a well-known academic who was engaged by the County as a consultant in this case, this area was "set aside for possible use by incoming and outgoing aircraft." (Jan G. Laitos, *Height Restrictions Near Airports: Physical Takings, Regulatory Takings, or Police Power Exercises?* 55 Land Use Law & Zoning Digest, no. 9, at p. 4 [Sept. 2003].) Just so.

> "The purpose of the Transition Zone is *to allow aircraft the temporary use of airspace above privately owned property.* The County adopted the ordinances to prevent building into the Transition Zone because *aircraft could need to use that airspace at unpredictable times.*" (Laitos, *op. cit.*, p. 4; emphasis added.)

As such, the ordinance de facto converts Petitioners' airspace into the functional equivalent of a

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[1] The County even urged the Nevada Supreme Court to hold that it had acquired a prescriptive easement to have aircraft fly over this property (AOB 29), an interest that could *only* be acquired by actual, continuous, and long-term physical invasion of the landowners' property — a concession, in other words, that a physical taking had indeed occurred.

"runaway truck ramp" on a highway, that is, an area where an out of control vehicle can get safely out of the normal traffic lanes. The fact that it may not be regularly used makes it no less a part of the public highway and no less the responsibility of the agency that owns and maintains the highway.

To maintain the "transition" zone for aircraft flight whenever pilots (in their sole discretion) feel appropriate, the County has prohibited the landowners from making any use of a large volume of airspace within their ownership that slopes upward from 35 feet nearest the runway to 200 feet further away (Ord. 1221; App., p. 4, 6), constituting some 60% of their otherwise useable airspace. (App., p. 12.)[2] That privately owned airspace is earmarked for physical use by aircraft in flight, as the County's aviation expert testified.

As the trial court found: "the governmental action . . . denies the Landowners the right to use the air rights and it denies the right to exclusive possession of the air rights and it allows the airport to use the air rights of the Defendants." (App., p. 63.)

This 37-acre parcel was brought closer to the airport when the County decided to expand its

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2 These factual aspects of the case thus bear a striking similarity to *Sneed v. County of Riverside*, 32 Cal. Rptr. 318 (Cal.App. 1963) (discussed *post*, pp. 9-10, 12) where, in the guise of just such wedge-shaped height limitations, the county de facto took an avigation easement to facilitate operations at its own airport.

commercial jet operations by enlarging and converting a general aviation runway (one used by small private planes) into another major arrival and departure point for the largest jets serving Las Vegas. Having small private aircraft as neighbors is one thing; replacing them with large commercial jetliners is something else. It was the extra maneuvering room needed by the latter that prompted the County to expand its "transition" zone to include a large chunk of the landowners' property and force its dedication to public use.

The landowners' property is otherwise in what would be considered a "high rent" district, being near the famous Las Vegas Strip,[3] and in close proximity to the Luxor, Mandalay Bay, Monte Carlo, Bellagio, Alladdin, and Balley's casino/resorts. As the Strip development moved closer to this property, it became progressively more valuable.

Thus, the landowners' expert appraisal witness testified that the highest and best use of the property (absent the County's taking of the airspace) was to develop it in the same manner as its neighbors, as a major casino/resort, with a 400-foot hotel tower. Nearby casino/resort operators confirmed that opinion.

With the regulation in place — and the recurring aircraft overflight a reality — the use of the property

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[3] The Las Vegas Strip is just westerly of the subject property, and its casino/resort hotels are both north and south of that point, quite near the airport.

shrank to uses like warehouse, cemetery, or golf course; in other words, nothing approaching its potential before the County took the use of the airspace, illustrating precisely the sort of devastating impact of an avigation easement on underlying land, visualized by this Court in *United States v. Causby*, 328 U.S. 256, 262 (1946).

The County's expert appraisal witness concurred that, before the County placed the property into the airport's "transition" area, the landowners had the right to make the same kind of development as anyone else with property on or near the Las Vegas Strip.[4]

The trial judge held that the County's actions resulted in a physical taking of the landowners' property and set the matter for a valuation trial. (App., p. 63.)

The impact of the County's conversion of the airspace rights in this property to public use was dramatic. The County's own appraiser testified that the landowners were damaged to the tune of $5,320,000. The landowners' appraiser thought it was considerably more, and so did the jury, which awarded $13,000,000 for the taking. With interest and litigation costs, the judgment came to $22,107,674.13. (App., pp. 19-20.)

The Nevada Supreme Court reversed, holding if there was a taking, it was regulatory, not physical. To

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[4] An inkling of the property's value was shown when the County stipulated before trial to pay the landowners $758,000 for a narrow slice of it to widen Tropicana Boulevard.

proceed on a regulatory taking theory, the landowners were told to pursue development applications to the County — a process certain to consume years — and then sue if those were denied. (App., p. 2.) In the meantime, their property would be physically used by the airport, and the County would thereafter claim prescriptive rights to continue that use, as it did (unsuccessfully to this point) in the courts below.

The Nevada Supreme Court misunderstood the nature of the taking involved here and compounded the State court conflict on this basic issue of 5th Amendment takings law. Thus, this petition.

REASONS FOR GRANTING THE WRIT

I

THERE IS WIDESPREAD, DIRECT CONFLICT AMONG THE STATE COURTS ON WHETHER GOVERNMENT ACTION THAT PUTS PRIVATELY OWNED, BUILDABLE AIRSPACE NEAR AIRPORTS TO PUBLIC USE IS A PHYSICAL TAKING THAT REQUIRES COMPENSATION UNDER THE U.S. CONSTITUTION'S 5TH AMENDMENT

The fifteen State courts that have analyzed this question have reached conflicting results. Nine States have held that such government action results in a physical taking of property that constitutionally requires compensation. Six States (including the one below) refuse to require compensation. The application of this

basic element of the federal constitution should not depend on the situs of the affected property.

A

States That Require Compensation

Nine State courts have held that airport operators must compensate adjacent landowners for the physical taking accomplished by building height regulations that permit flight through their airspace at low levels: Indiana, Mississippi, Idaho, Ohio, California, New Jersey, Minnesota, Washington, and Kentucky.[5]

In these cases, a municipal airport operator had imposed height restrictions curtailing building on

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[5] *Indiana Toll Road Comm. v. Jankovich*, 193 N.E.2d 237 (Ind. 1963); *Jackson Municipal Airport Auth. v. Evans*, 191 So. 2d 126 (Miss. 1966); *Roark v. City of Caldwell*, 394 P.2d 641 (Idaho 1964); *Hageman v. Board of Trustees*, 251 N.E.2d 507 (Ohio App. 1969); *Peacock v. County of Sacramento*, 77 Cal. Rptr. 391 (Cal.App. 1969); *Sneed v. County of Riverside*, 32 Cal. Rptr. 318 (Cal.App. 1963); *Tara Engineering Corp. v. City of Newark*, 40 A.2d 559 (N.J. 1945); *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980); *Ackerman v. Port of Seattle*, 348 P.2d 664 (Wash. 1960); *Kentucky Airport Zoning Comm. v. Kentucky Power Co.*, 651 S.W.2d 121 (Ky. App. 1983); see also *United States v. 48.10 Acres of Land*, 144 F. Supp. 258 (S.D.N.Y. 1956).

property adjacent to its airport. When the property owners sued, each of these courts held that the severe restriction on building heights was a taking that constitutionally required compensation. These courts noted that the restrictions were intended to permit actual physical use of the privately owned airspace by aircraft (whether few or many was not relevant) and that such interests could — and should — have been directly acquired for public use by eminent domain.

Additionally, some opinions noted that the action was taken in the municipality's entrepreneurial capacity as a self-interested airport operator (responsible, under *Griggs*, 369 U.S. at 89-90, for acquiring airspace needed for safe operations), rather than as a disinterested referee of land use disputes among other landowners, as is the case with land use regulations generally. These cases are thus in harmony with this Court's decisions viewing warily regulatory action in which the regulator has a financial interest. (*United States v. Winstar Corp.*, 518 U.S. 839, 896 [1996] ["statutes tainted by a governmental object of self-relief . . . in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties"]; *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55-56 [1993] [care taken because "the Government has a direct pecuniary interest in the outcome"]; *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 [1977] [caution exercised "because the State's self-interest is at stake"].)

In these State court cases, constitutional responsibility was placed on the municipality.

The Nevada Supreme Court acknowledged that these cases conflicted, attempted to distinguish those from California, Washington, Kentucky, and New Jersey (App., pp. 35-36), but could only note (without even trying to distinguish) the conflict it created with the decisions from Idaho, Indiana, Minnesota, and Mississippi (App., p. 36, n. 88).

B

States That Deny Compensation

Five states (aside from Nevada in the instant case) have held that airport operators may order adjacent landowners to dedicate their airspace for public use by aircraft without making any compensation whatever: Wyoming, Illinois, Iowa, Florida and Kansas.[6]

These courts viewed the regulations as routine police power exercises, for which compensation is not required. They seemed not to grasp that the regulators were in fact acquiring privately owned, privately usable property for physical use by members of the public, thus creating conflict not only with the other State

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[6] *Cheyenne Airport Bd. v. Rogers*, 707 P.2d 717 (Wyo. 1985); *La Salle National Bank v. County of Cook*, 340 N.E.2d 79 (Ill. App. 1975); *Fitzgerrald v. City of Iowa City*, 492 N.W.2d 659 (Iowa 1992); *Harrell's Candy Kitchen v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439 (Fla. 1959); *Kimberlin v. City of Topeka*, 710 P.2d 682 (Kan. 1985).

courts discussed earlier, but also with this Court's consistent efforts to distinguish between mere regulation that does not require compensation and action that either demands or permits the use of private property by third parties that does — as discussed in the next section.

The conflict is probably best explained by one of the California cases that required compensation:

> "We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulations of buildings and the zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone." (*Sneed v. County of Riverside*, 32 Cal. Rptr. 318, 320 [Cal. App. 1963].)

Airport height restrictions are different from land use regulations in general and other kinds of height restrictions in particular because they allow actual physical invasion by the public, and do not just regulate the private use of land. Constitutionally, they require different treatment, as do all other cases where government authorizes physical invasion of private property by members of the general public. (See cases discussed *post*, pp. 15-20.)

II

THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT GOVERNMENT ACTION REQUIRING PROPERTY OWNERS TO SUBMIT TO PUBLIC TRESPASS IS A *PER SE* PHYSICAL TAKING THAT REQUIRES COMPENSATION

The County's action plainly was designed to permit pilots to use the landowners' airspace at low levels as and when they choose. (App., p. 16.) The County's own expert aviation witness testified that the purpose of the "transition" zone into which the subject property had been placed was to allow "maneuvering" room so that pilots "on occasion" could use the landowners' airspace if they felt they needed to — not on a daily basis, or even a predictable basis, but whenever the pilots see fit. (App., p. 13.)

The Nevada Supreme Court said that was merely a regulatory matter, to be adjudged a taking — if at all — only under this Court's regulatory taking cases, not its physical taking cases.

The decision below wholly confuses the distinction between actual regulations that impact the extent of an owner's individual ability to use private land and actions that are "regulations" in form but, in fact, permit members of the general public to use private land as though it were publicly owned. The latter are *per se* physical takings.

A

Regulatory Taking Cases Involve Government Action That Merely Restricts The Use Property Owners May Make Of Their Own Land

The Court below misunderstood the difference between regulations and physical invasions.

Land use regulations do things like segregate inharmonious land uses, preserve historic structures, and plan for orderly development. Thus, in a typical regulatory taking case, a government agency enacts a regulation, or applies a condition, that either denies or restricts landowners' rights to use their own land. This can take the form of a down-zoning, a permit denial, a variance denial, a conditional permit grant, or the like. Examples can be found in cases like *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).

Whether such action subjects the government to 5th Amendment liability depends on the severity of the impact, determined on an *ad hoc* case-by-case basis, as described in the seminal *Penn Central* decision. (For recent reaffirmations of the *Penn Central* analysis, see *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 [2001]; *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 326-327 [2002].)

In such cases, the regulations are designed to limit the uses of land by their owners, but not to create new uses of private property by third parties. When the impact of even the best-intended regulation is so severe that it denies economically productive use of the affected land, then compensation is constitutionally mandated — either under the *ad hoc Penn Central* factual analysis or, if the impact is severe enough, under the categorical analysis of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

But that is not this case. This case is ***not*** about a mere regulation of the use of the landowners' property, but a County action *permitting members of the public to fly through this privately-owned airspace at will.* That requires a different analysis.

B

When Government Action Compels Private Property Owners To Allow Their Property To Be Used By The Public, That Is A Physical Taking Requiring Compensation

The County's action does not merely regulate or restrict the landowners' use of their property. Instead, it grants the flying public the right to invade the landowners' airspace at low levels, thereby stultifying rational economic use of the property.

Such actual public use is a physical taking of property. As the County never acquired the right to use

that property itself, it cannot grant that right to third parties — unless it adopts "the constitutional way of paying for the change." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 [1922].) Anything less, as the Court put it in *Pennsylvania Coal*, 260 U.S. at 416, would be an effort to satisfy a municipal "desire by a shorter cut" than the constitutional framers decreed.

The Nevada Supreme Court appears to have fallen into a label affixation trap. Because the County *claimed* it was merely regulating, the court treated its action as regulatory. But this Court has always judged governmental actions by their effects, not merely by their words. "The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment." (*Davis v. Newton Coal Co.*, 267 U.S. 292, 301 [1925].) Or, as more recently summarized, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." (*Hughes v. Washington*, 389 U.S. 290, 298 [1967] [Stewart, J., concurring].)

What the Nevada Supreme Court did was to violate one of the most important rights a property owner has, the right to exclusive possession:

> "In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession — the right to exclude strangers, or for that matter friends, but especially the Government." (*Hendler v. United States*, 952 F.2d 1364, 1374 [Fed. Cir. 1991].)

When government mandates permanent physical invasion, the 5th Amendment commands compensation "no matter how minute the intrusion, and no matter how weighty the public purpose behind it . . . ." (*Lucas*, 505 U.S. at 1015.)[7]

— *Item*: In *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979), the government sought to require the owner of a private marina to allow members of the public to use its waterways. The Court held that such a regulatory requirement would be a physical taking (because it allowed public trespass on otherwise private property) and could not be done without compensation.[8]

— *Item*: In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a New York statute required apartment building owners to permit cable TV companies to install minute quantities of cables and boxes for their customers. Such authorization of third party trespass, held the Court, required compensation.

— *Item*: In *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987), the Court held that requiring

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[7] In this context, "permanent" physical invasion means that those authorized by the government may use property when and as they see fit for as long as they choose. (*Hendler*, 952 F.2d at 1377.)

[8] That was a taking even though the public would only be using the same navigational lanes that were being privately used. Here, by contrast, the public is able to use the airspace over *all* of the subject property.

property owners to allow members of the public to walk on their beach could not be done without compensation. This rule was amplified in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in the context of a required bike path to be used by members of the public.

In each of these cases *government enacted regulations that enabled strangers — i.e., members of the general public — to trespass at will.* And it was that enablement, that the underlying property owners did not invite[9] and were powerless to prevent, that rendered the government liable for a taking. One of the keys — which fits this case like the proverbial glove — is that "the owner may have no control over the timing, extent, or nature of the invasion." (*Loretto*, 458 U.S. at 436.) As the County's aviation expert testified, such unplanned, uncontrolled, unknown use of the airspace was precisely the effect of the County's regulation. That was confirmed by the post-trial evaluation of the evidence and the issues by County consultant Professor Laitos, quoted *ante*, p. 4.

The Court of Appeals for the Federal Circuit aptly summed up the proper rule — a rule plainly in conflict with the Nevada Supreme Court:

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[9] If the property owner invites third parties onto the property, there is no government liability for regulating the *manner* of such use. (See *Yee v. City of Escondido*, 503 U.S. 519 [1992] [mobile home park owner invited tenants to use the property]; *F.P.C. v. Florida Power Corp.*, 480 U.S. 245 [1987] [power company permitted others to string wires on its poles].)

> "As a general proposition, if the Government for purposes of public use physically occupies, either by its own agents or *by third parties*, privately owned land over the owner's objections, *liability is a foregone conclusion.*" (*Brown v. United States*, 73 F.3d 1100, 1103 [Fed. Cir. 1996; emphasis added].)

The decision below conflicts with each of these decisions, by eliminating compensation as the Constitutional *quid pro quo* for a County regulation that opens private property to public trespass.

This line of decisions was bolstered by Congress when it passed the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. § 4601 *et seq.*) One of the uniform national policies set out there is that the government shall not "intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property." (42 U.S.C. § 4651[8].) The law's "uniform" nature is enforced by precluding the grant of federal funds to states that do not agree to comply with its policies. (42 U.S.C. § 4655.)

Like other states, Nevada has authorized airport operators to condemn whatever airspace rights are needed for airport purposes. (See App., p. 23.)[10] Clark County chose not to do so, but to attempt to simply

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[10] For an illustration of such a direct condemnation of air rights, see *City of Oakland v. Nutter*, 92 Cal.Rptr. 347 (Cal.App. 1970).

alchemize private property into public domain by resolution, thus violating not only the 5th Amendment, but the Uniform Act as well. As Clark County would have been compelled to pay compensation for these air rights if it had followed the Uniform Act and initiated its own eminent domain action, it cannot be in a legally superior position by violating the statute and compelling these landowners to initiate their own suit.

The County's acquisition of the right to invade this property at will was a *per se* physical taking, as this Court's cases and Congressional enactment confirm.

C

This Court Has Carefully Separated Physical And Regulatory Takings. The Decision Below Makes Hash Of The Court's Design

If any doubt remained about the difference between physical and regulatory takings, the Court dispelled it in *Tahoe-Sierra*, three years ago:

> "This *longstanding distinction* between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, *makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa.*" (535 U.S. at 323-324; emphasis added.)

The Nevada Supreme Court crossed that line. It took the facts of this physical invasion case and applied the law of regulatory takings. The conflict with this Court and other courts must not be allowed to stand.

III

THIS COURT'S MOST RECENT CASE INVOLVING AIRPORT OPERATOR RESPONSIBILITY IS MORE THAN 40 YEARS OLD. EXPANSION OF PRECEPTS LAID DOWN AT THE DAWN OF THE JET AGE IS NEEDED

This Court has decided two cases involving issues of airport operator responsibility: *United States v. Causby*, 328 U.S. 256 (1946); and *Griggs v. Allegheny County*, 369 U.S. 84 (1962).[11] That is almost ancient in the context of aviation technology.

Causby (in 1946) and *Griggs* (in 1962) were cases brought by people whose properties were overflown by noisy aircraft to such an extent that the noise itself was held to have taken, or inversely condemned, an easement for flight over the land. Not surprisingly, these early cases involved the nuisance-

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[11] The Court later decided *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), but that case involved only pre-emption of a municipality's *police power* to regulate the use of an airport when the airport is owned and operated by a *different* entity. *Burbank* has no impact here.

like by-products of aviation and questions of the rights of airport neighbors to any relief at all, as well as the distribution of power and responsibility among the federal, State, and local governments.

This Court held that the 5th Amendment requires compensation when federal airport operations substantially impact the property rights of neighbors (*Causby*), that the 14th Amendment transmits that liability to local airport operators (*Griggs*), and that the responsibility for acquiring sufficient property to operate an airport safely and properly belongs to the airport operator, not the federal government (*Griggs*).

Both cases set the stage for later litigation — primarily in State courts — over airport owner/operator liability for the impact of their operations on property owners nearby.[12] Both pre-date the explosive growth of commercial jet aviation and the evolving application of 5th Amendment precepts by State courts. *Griggs*, for example, involved facts arising before the inception of American commercial jet commerce in 1959.

This Court has not considered related issues in more than four decades. As the Nevada Supreme Court could find no other cases dealing with the responsibilities of airport operators, it concluded that

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[12] Although involving the 5th Amendment, federal cases have largely been confined to issues involving the impact of military flights. (E.g., *Brown v. United States*, 73 F.3d 1100 [Fed. Cir. 1996]; *Branning v. United States*, 654 F.2d 88 [Ct. Cl. 1981].)

this Court's interest was restricted to overflight noise issues, and other issues were at large. (App., p. 31.)

State courts have done a consistent job since *Causby* and *Griggs* of holding airport operators liable for takings caused by aviation noise nuisances. (See cases collected in Michael M. Berger, *Airport Noise in the 1980's: It's Time for Airport Operators To Acknowledge the Injury They Inflict on Neighbors*, 1987 Institute on Planning, Zoning, and Eminent Domain, ch. 10, p. 10-19, n. 63 [Sw. Legal Foundation 1987].)

But the States seem to be having difficulty with height limitation/physical invasion requirements like the one at bench, resulting in the drastic split of authority shown above. The Nevada Supreme Court's narrow view of this Court's cases being restricted to noise nuisances is obviously part of the problem. In the same way that commercial airport operations have matured and expanded with the delivery of larger and more sophisticated aircraft, this Court's jurisprudence needs to match that maturity with a modern discussion of airport operator responsibility whose holding goes beyond noise nuisances.

An updated approach is needed because this Court's earlier decisions did not deal directly with the issue presented here. Although both of its earlier cases pointed the way by making airport operators responsible for acquiring whatever adjacent property interests are needed for safe, effective operation, that is apparently not enough for courts like the Nevada

Supreme Court and the others that are on its side of the decisional divide.

As this Court put it in *Griggs*, the responsibility of an agency establishing and operating an airport is no different than an agency building a bridge: a bridge is useless without approach roads, and an airport is useless without similar approaches through the air. In both cases, the facility's sponsor is financially responsible for the acquisition. (369 U.S. at 89-90.)[13]

This case presents a closely related issue: when an airport operator attempts to fulfill its *Griggs* duty to acquire sufficient airspace to ensure safe operation — but does so by ordering adjacent property owners to allow uncompensated flight through their airspace rather than forthrightly buying that right — is the operator liable for a 5th Amendment physical taking for enabling all pilots to use that private property at any time they choose?

In other words, can a municipal airport operator evade its Constitutional *Griggs* responsibility to acquire property for airport operations by ordering neighboring property owners to provide that property *gratis*? The Nevada Supreme Court believed it had *carte blanche* on this issue because this Court had not

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[13] The Nevada Supreme Court acknowledged that "Causby and Griggs are physical takings cases." (App., p. 31.) Its error was in failing to acknowledge that this is a physical taking case too, and is thus governed by the same Constitutional precepts.

yet directly addressed it (although its precepts should have been discernible from *Causby* and *Griggs*).

As shown earlier, the State courts are in conflict on this issue of federal Constitutional law. An answer is needed from this Court, so that property owners receive the same protection against uncompensated physical invasion by aircraft whether they live on the east or west side of the Colorado River, or the north or south side of the Ohio River. (See *ante*, pp. 9, n. 5; 11, n. 6.)

CONCLUSION

Even as the Court is considering this Petition, jet airliners are using Petitioners' property for maneuvering at McCarran International Airport. But the only "remedy" the Nevada Supreme Court offered is pie in the sky, and a vague prospect that "some day your price will come" if Petitioners jump through the inappropriate regulatory hoops — a process that, at best, takes years and often additional litigation (a reality displayed in this Court's regulatory taking cases over the last quarter-century).

However one tries to massage it, and whatever spin one attempts to apply to it, the County's action and intent was to provide airspace into which aircraft landing at or taking off from its airport can physically intrude whenever their pilots desire.

That is a governmental acquisition of a public avigation easement over privately owned, privately

usable land. It is a present physical taking that requires compensation.

At this time, however, State courts are in direct conflict over the 5th Amendment ramifications of this kind of municipal action, and a uniform resolution is needed.

The Petitioners pray that the Court grant certiorari to resolve this constitutional issue.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEVADA

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Appellant/Cross-Respondent, vs. TIEN FU HSU; LISA SU FAMILY TRUST; LISA SU TRUSTEE; PETER B. LIAO; WESTPARK, INC.; LUCKY LAND COMPANY; LUCKY LAND COMPANY INVESTMENTS; LUCKY LAND COMPANY ENTERPRISES LIMITED PARTNERSHIP; AND WEST PARK COMPANY 1, Respondents/Cross-Appellants.	No. 38853

ORDER OF REVERSAL AND REMAND

(Filed Sep. 30, 2004)

Clark County appeals from an inverse condemnation judgment adjudicating a taking of airspace over real property owned by respondents, Tien Fu Hsu, et al. ("the landowners"). The judgment contained a substantial award of damages pursuant to a jury verdict. The County argues on appeal that the district court erroneously granted partial summary judgment on the issue of liability based upon its conclusion that county, airport height restriction/zoning ordinances effected a "per se" physical taking of the easement. We agree and conclude that this case raises regulatory, not per se physical takings issues. However, we are unable to conclude whether a compensable regulatory taking occurred because the landowners' inverse condemnation claims are not yet ripe for

review on the merits. Therefore, we reverse the district court's judgment and remand this case to the district court for further proceedings to determine whether and the extent to which the height zoning regulations prevent new development of the subject property. On remand, the landowners may ripen their case by submitting meaningful development plans and seeking a variance from the County. Only then will the district court be able to adjudicate the takings issue pursuant to the criteria for regulatory takings.

FACTUAL AND PROCEDURAL HISTORY

This case involves an alleged inverse condemnation of airspace rights near McCarran Airport in Clark County, Nevada. More specifically, the landowners contend that the County's imposition by ordinance of height restrictions near the end of runway 19R/1L at McCarran constitutes a physical "taking" of their property. The affected property consists of seven separate assembled parcels owned by separate individuals or entities, totaling approximately thirty-seven acres.[1]

The County has restricted the height of buildings on property surrounding the airport since 1955 to avoid hazards to air navigation. These restrictions were accomplished by use of four types of zones, the most restrictive being the "runway approach" zone, and decreasing restrictions through "transition," "horizontal," and "conical"

[1] The record does not contain the price paid for these parcels of land. The landowners assert that they purchased these parcels between 1984 and 1992.

zones. These restrictions depend upon proximity to the airport runways.

On January 20, 1981, the County passed Ordinance No. 728, which extended the horizontal zone over the subject property, effectively limiting structures to a height of 150 feet, and placed one corner of the subject property in a transition zone.[2]

The landowners describe a transition zone[3] as an area

> adjacent to the runway "Approach Zone" (i.e., the area actually designed for aircraft to use in normal approach and departure), and is used when aircraft are unable to confine their flight, within the Approach Zone and stray beyond it.

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[2] Ordinance No. 429, passed in 1974, also placed a portion of the landowners' property in the transition zone.

[3] Section 29.50.020(B) of Ordinance No. 728 defined a "transition zone":

> Transition zones are established adjacent to each runway and approach zone and are the areas beneath the transitional surfaces. Transition zones extend outward from the primary surface and shall slope upward and outward one (1) foot vertically for each seven (7) feet horizontally to the point where they intersect the surface of the horizontal zone. Transition zones are also established adjacent to approach zones for the entire length of the approach zones. Such transition zones flare symetrically [sic] with either side of the runway approach zones from the base of such zones, and slope upward and outward at the rate of one (1) foot vertically for each seven (7) feet horizontally to the points where they intersect the surface of the horizontal and conical zones. Transition zones are also established adjacent to a precision instrument approach zone where it projects through and beyond the limits of the conical zone, extending a distance of 5,000 feet measured horizontally from the edge of the instrument approach zone at right angles to the runway centerline.

Ordinance No. 728 affected the property below the "transition surface"[4] by generally prohibiting the construction of structures into the transition zone. In any of the various height zones, a landowner could build structures up to thirty-five feet in height.[5] However, no buildings could be constructed in any zone unless the Federal Aviation Administration (FAA) and the Clark County Director of Aviation determined that the proposed building was situated or marked so as not to constitute a hazard to aircraft navigation. All construction within any of the zones was subject to the requirement that property owners grant an avigation easement in favor of the County.[6]

Ordinance No. 728 did not entirely prohibit nonconforming uses. It established a variance process, which allowed application to the Clark County Planning Commission when an affected property owner desired to build

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[4] An imaginary line running one foot vertically for seven feet horizontally from the approach zone extending to the horizontal and conical zones.

[5] The property was zoned "T-C" (trailer court) at this time. That designation prohibited building structures above thirty-five feet.

[6] The Texas Court of Appeals defines such easements generally as the right to fly over a subject property, and specifically as the " 'right to the navigation of airspace over designated land and to the use of land as an incident to [n]avigation. . . . It provides not just for flights in the air as a public highway, but for flights that may be so low and so frequent as to amount to a taking of the property.' " *City of Austin v. Travis County Landfill*, 25 S.W. 3d 191, 195 n.2 (Tex. App. 1999) (quoting 2A CJS *Aeronautics & Aerospace* § 2 (1972), *reversed on other grounds* by *City of Austin v. Travis County Landfill*, 73 S.W. 3d 234 (Tex. 2002)). Also, in *United States v. Brondum*, 272 F.2d 642, 645 (5th Cir. 1959), the Federal Court of Appeals for the Fifth Circuit noted that an avigation easement "provides not just for flights in the air as a public highway – in that sense no easement would be necessary, it provides for flights that may be so low and so frequent as to amount to a taking of the property."

a structure that would exceed the height limitations. This process allowed variances where

> a literal application or enforcement of these regulations would result in practical difficulty or unnecessary hardship, and the relief granted would not be contrary to the public interest, but would do substantial justice and be in accordance with the spirit of these regulations and of Chapter 29.66 of the Clark County Code.

In 1981, Tropicana Enterprises, prior owners of some of the later assembled parcels, requested a zone change from T-C (trailer court) to H-1[7] (limited resort and apartment). It also sought a special use permit and height variance to construct a 1,000 room high-rise hotel with a proposed height of 230 feet; 50,000 square feet of casino, shops and offices; and a five-story parking garage. The prior owner additionally sought a zone change from T-C to R-5 (apartment residential) with regard to another portion of the property, and a special use permit and height variance to construct a 250-unit apartment complex, also with a proposed height of 230 feet. Although the planning commission and the airport authority initially approved the project, the director of aviation lodged written opposition to the project after further review on the basis that the project exceeded transition-zone height restrictions. The applicant modified the proposal to address the opposition by reducing the height of the proposed buildings. However, at a July 7, 1981, meeting, the Clark County Board of Commissioners denied the requests because

[7] H-1 zoning permits structures to 100 feet in height.

Tropicana Enterprises refused to pay relocation costs of the mobile home residents on the property.[8]

In 1990, McCarran began upgrading runway 19R/1L for use by commercial jet aircraft, including expansion of the runway in conformity with the 1979 Clark County master plan. Ordinance No. 1221, effective August 1, 1990, amended Ordinance No. 728, reflecting the changes in the use of the runway.[9]

Ordinance No. 1221 expanded the transition zone. This provision placed the landowners' property further into the zone and thus subjected the property to additional height restrictions.[10] The ordinance required that any person proposing to construct a structure exceeding a height of 200 feet, or one exceeding "[t]he plane of an imaginary surface extending outward and upward at a slope of 100 to 1 for a horizontal distance of 20,000 feet from the nearest point of the nearest runway," notify the

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[8] In this, the County was not placed in a position of sustaining or overruling an objection to development by the airport authority involving penetration of transition surfaces. However, this interaction is suggestive of the notion embraced by the district court in its futility findings, that the County would not override airport recommendations, and that transition zone restrictions were of paramount importance to land use approval issues. *See* discussion *infra*.

[9] In September 1996, McCarran received two federal grants to extend the runway. Construction was finished in 1997. The landowners assert that the expansion of the transition zones via Ordinances Nos. 728 and 1221 satisfies FAA requirements for grant approval. In turn, the federal nature of the. project implicated the Uniform Relocation Assistance and Real Property Acquisitions Policies Act ("Federal Relocation Act") (42 U.S.C. §§ 4601-55 (2000) (adopted in Nevada by NRS chapter 342)). *See infra* note 29.

[10] Height restrictions on the property following imposition of Ordinance No. 1221 ranged from approximately 35 feet to 200 feet.

FAA of the proposed construction. The ordinance also provided that the Clark County Board of County Commissioners held final authority to grant variances from the height restrictions. While the slope described in this provision did not precisely correspond to the slope of the transition surface, it provided the minimum criteria for when proposed construction implicated FAA notification.

In 1994, Lisa Su, one of the landowners, granted the County a perpetual avigation easement as a condition of a zone change from T-C to C-2 (general commercial) to place a pair of fifty-foot billboards on one corner of her property.[11] The easement provided for flight across the affected portion of the property (the area over the billboards), as well as the right to cause noise inherent with aircraft flight. She also agreed to release the County and aircraft operators from any loss or psychological harm associated with overflight noise.

On April 23 and June 26, 1994, the County filed separate actions in district court, seeking condemnation of a portion of the subject property for road widening. On November 20, 1995, the landowners counterclaimed, seeking a separate inverse condemnation award.[12] The counterclaim alleged that the County, through the height restrictions in County Ordinance Nos. 728 and 1221, imposed an avigation easement over the property, which

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[11] These billboards exceeded transition zone height limitations at their location.

[12] On January 17, 1997, the district court entered a judgment by stipulation of the parties allowing for the condemnation in aid of the road-building project. The court entered a final order of condemnation on May 12, 1997. Thus, the only remaining issues left to litigate below stemmed from the inverse condemnation action.

resulted in an uncompensated taking due to a substantial reduction in its potential use and value. The landowners contended that they were unaware of the height restrictions on their property until October 1995, and alleged that the ordinances restricted the highest and best use of their property – a hotel/casino facility. Additionally, the landowners alleged that they were not obligated to exhaust their administrative remedies through the variance procedures "because the ordinance provides no variance will be given."[13] Finally, the landowners contended that the avigation easement would lead to increased noise and dust over their property.[14] The landowners requested compensation for the taking, as well as litigation costs and expenses.[15]

In early January 1997, the County moved for summary judgment, arguing that the case raised regulatory takings issues, and that the landowners could not maintain a claim for a regulatory taking without first exhausting their administrative remedies, *i.e.*, by seeking relief from the regulatory measures through a variance application. Without exhaustion, the County asserted, the inverse condemnation claim was not yet ripe for judicial

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[13] The landowners' complaint did not expand on this statement. They later argued in pretrial proceedings that the ordinance provided no variance procedure for proposed construction above the height restrictions, and that the Clark County Board of Commissioners had denied the 1981 variance application submitted by the prior owner. The landowners also later argued that they were not obligated to exhaust their administrative remedies because that requirement did not apply to eminent domain actions concerning per se physical takings.

[14] This portion of the counterclaim was later dismissed without prejudice by stipulation of the parties.

[15] *See* 42 U.S.C. §§ 4601-55 (2000).

determination. On June 17, 1997, the district court concluded that any attempt by the landowners to obtain a variance would be futile and relieved the landowners from further exhausting their administrative remedies.[16] The district court based its ruling in part upon the County's refusal of the 1981 variance application by Tropicana Enterprises. The district court also precluded the County from introducing any evidence at trial of the landowners' knowledge of the height restrictions imposed by Ordinance Nos. 728 or 1221 when they purchased their property. The court concluded that this evidence had no material bearing on the landowners' ability to obtain compensation.

In August 1997, for litigation purposes only, the landowners submitted a hypothetical 240-foot building plan to the FAA.[17] The proposal placed the building ten feet east of the landowners' eastern property line, into an area severely affected by the height restrictions. The FAA concluded that while the proposed building exceeded the transition slope by 148 feet, this finding alone did not mean that the building would constitute a hazard to aircraft navigation. After further study, the FAA concluded

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[16] The district court relied upon *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), in reaching this conclusion.

[17] The landowners later stated that they submitted these plans to the FAA "only to get a preliminary reading from the FAA as to what criteria would be used by the FAA to determine whether a structure on the landowners[']' property would be permitted." The landowners also explained that the "sole purpose in submitting [the plans] to the FAA was to find out whether there were any surfaces, in addition to the height restrictions placed on the property by ordinance, that would impact the ability to construct a high rise hotel on the property."

The County unsuccessfully sought to admit the landowners' plans and subsequent FAA ruling at trial to discount the landowners' argument that the transition slope was impenetrable.

that the hypothetical 240-foot building would exceed "Terminal Instrument Procedures" criteria for runway 19R/1L by seventy-one feet, thus adversely impacting new minimum clearances for precision landings. Accordingly, the FAA explicitly indicated that, if the landowners would reduce the height of the proposed structure by seventy-one feet, or locate the structure 225 feet to the west, it would have no impact on aeronautical operations or aircraft navigation.[18] Implicitly then, the FAA would conceivably approve the construction of structures on the subject property that would penetrate the transition zone.[19]

On September 2000, Lisa Su testified by deposition that, as of 1986, she owned an interest in the subject property through her involvement with the Lucky Land Company. Litigation arose in 1987 between several owners

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[18] It appears from the record that moving the proposed building location 225 feet west would place it on the landowners' property.

[19] An affidavit in the record of William Keller, Principal Planner for the Clark County Department of Aviation, submitted in support of a pre-trial offer of proof by the County, indicates that the Stratosphere Tower near downtown Las Vegas penetrates the transition zone for runway 19R at McCarran International Airport, and that the Hard Rock Hotel and Casino located on south Paradise Road in Clark County penetrates the approach and transition surfaces for runway 19R. The district court did not have this information available to it when it made its futility ruling. However, as discussed below, this information is relevant to our examination of the regulatory takings issues.

Further, the affidavit by Teresa Arnold, an airport planner in the Planning and Environment Division of McCarran, established that between early 1995 and 1997, the County considered at least fourteen applications for height variances, ranging from eighty feet (the Homewood Suites) to 1,149 feet (the Stratosphere tower). Of these, all gained approval, except one, which was withdrawn prior to a determination. We note that these variances were not restricted to the close proximity of the airport.

of the property, which precluded Su from engaging in any development. Su acquired title to her parcels in the name of her trust in 1992 following litigation. She stated that she did not develop the property at that time, because she lacked sufficient funds. She testified that she never commissioned feasibility studies, pro forma statements or financial calculations, never spoke with hotel operators about possible utilizations of the property, and never applied for a height variance to allow for a hotel/casino project. She did, however, testify to discussions of some kind concerning a possible hotel/casino project and that, with adequate financial resources, she would have proposed a building of maximum height to optimize the property's economic potential.

Su derived monthly, income of $15,000 from two of the mobile home parks and a bar on the property, as well as the two billboard sign rentals. She also confirmed that no changes in the use of the assembled properties had occurred since 1986, and that, at the time of trial, no current development plans were actually contemplated. She testified that she was unaware of any height restrictions on the property until 1995 or 1996, at which time she abandoned any plans for a hotel/casino.

Tien Fu Hsu also testified by way of deposition to his ownership/management of a nine-unit apartment building and a third mobile home park on his portion of the assembled property. Hsu stated that he had considered development, but did not aggressively pursue any project. Hsu had developed architectural plans for a hotel/casino with a previous owner, but as of September 2000, he entertained no plans to build anything higher than twenty-two stories. He testified he had not commissioned a study to determine how to best develop the property, never filed an application

for a zone change, and had left any plans for the property "to the future."

West Park, Inc., a closely held corporation controlled by Mr. Hsu, owned some of the subject parcels. In answers to written interrogatories, West Park denied creating plans for development outside of this litigation. Although renouncing any intent to develop the parcels on its own, West Park's interrogatory answers indicated Mr. Hsu's desire to join the corporate property with adjacent property to the west for development as a hotel/casino.

Tami Campa, a commercial real estate appraiser and licensed broker for the landowners, provided a pretrial affidavit regarding her appraisal of the property. She concluded that "a typical buyer would have the expectation of having the potential to build to a height of 400 feet, or over." She based this conclusion on her observation of the market, personal interviews, maps of the hotel towers near the property, and the deposition testimony of former Clark County Zoning Administrator Greg Borgel that: "everybody would like to go at least 400 feet." Based upon this 400-foot figure, Charles Brechler, the landowners' consulting engineer, calculated that the County took 4.4 percent of the landowners' airspace under Ordinance No. 728, and 59.3 percent under Ordinance No. 1221.[20]

On December 19, 2000, the landowners renewed a prior motion for partial summary judgment on the issue of liability. They contended that the loss of airspace through

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[20] These calculations were attached to the landowners' appraisal report. Other appraisers hired by the landowners (*e.g.*, James Himes) relied upon Brechler's conclusions in calculating the amount of airspace taken by the ordinances.

the height restrictions constituted a "per se" physical taking of their property, thus entitling them to compensation. In this, the landowners relied upon the deposition testimony of William Dunlay, the County's aviation expert:

> Q. Your understanding of that transition zone is that it creates a surface above which there are going to be issues about whether or not somebody can penetrate it from below. Correct?
>
> A. Yes.
>
> Q. And the reason that's done is because planes may on occasion need to go into that area for aeronautical operations. Correct?
>
> A. Yes. That's my understanding, just to provide some maneuvering room down close to the runway.
>
> Q. For airplanes to go into if they need to; correct?
>
> A. Yes.
>
> Q. And that may happen twice in a month or it may happen never in a year; is that correct? You just don't know?
>
> A. Don't know. . . .
>
> Q. And is there any way, in your mind, of knowing when that actual transition zone surface is used by an airplane?
>
> A. Not really, no.

The County filed a countermotion for summary judgment on liability and argued, in part, that the landowners' claims were not yet seasonable for judicial resolution. The County based its ripeness arguments on the

landowners' failure to submit development plans or seek a variance from the County and, thus, their failure to obtain a "final decision" regarding the application of the ordinances to the subject property. In this, the County sought de facto reconsideration of the district court's previous futility ruling relieving the landowners from exhaustion of administrative remedies through a variance process.[21]

The landowners responded with the deposition testimony of Robert Broadbent, former Director of Aviation at McCarran, in which he described the airport zoning variance processes. He testified that in 1995, the landowners would have had to file any proposal for construction with the FAA.. The landowners' counsel sought to establish what McCarran's stance would have been regarding proposed construction on the subject property:

> Q [landowners' counsel]: And if my clients had wanted to build a hotel/casino on their property that was, let's just say 22 stories in height, can you tell me what your response would have been?
>
> A [Broadbent]: No.
>
> Q: You can't tell me what it would have been, or it would have been "no"?
>
> A: I couldn't tell you what it would have been, because I don't know. I mean, you might get in the west part of the property and be able to go 22 stories.

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[21] *See* NRCP 54(b).

Q: Let's say that my clients wanted to build some structure on that property that went above what the ordinance said for the transition zone?

A: The airport would oppose it.

Q: And do you feel that – again, I understand nobody can –

A: It was interpreted by FAA to be a hazard.

Q: What if it wasn't? Did you have somebody at McCarran who actually looked at the ordinances?

A: If it didn't meet the qualifications of the ordinances in place, we would oppose it.

The landowners' counsel also sought to establish whether McCarran uniformly disapproved of transition zone variance applications:

Q: Can you think of a time from March of 1986 until your retirement as Director of Aviation in May of this year [1997] where McCarran opposed an application for a variance or a special-use permit so that somebody could build above the height restrictions set forth in the ordinance concerning airport height limits?

A: I don't remember the County Commission going against the recommendation of the airport, if the airport could show that it was the position of FAA and reasonably might limit the ability of airplanes to land or take off at McCarran.

. . . .

> Q: Can you remember as your tenure of Director of Aviation the County Commission ever granting a variance from the height restriction ordinance – for the airport height restriction ordinance for the transition zone?
>
> A: No.

While the landowners asserted that Mr. Broadbent's testimony established that they could never have obtained a transition zone variance, Mr. Broadbent's testimony on this point is equivocal, and other evidence in the record suggests that the transition surface was permeable, conditional upon an FAA determination that proposed construction would not create a hazard to aircraft navigation.[22]

In an order dated January 26, 2001, the district court concluded that it could determine whether the ordinances constituted a taking through summary judgment, that condemnable airspace rights existed,[23] that "aircraft do go through the airspace above the Landowners' properties[,] and that the airspace is necessary and used by the airport [for the public good]." The court also noted that, while it was unclear how often airplanes invaded the airspace over the property, it was clear that "the space is necessary and that it is used." Also, notwithstanding Mr. Broadbent's

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[22] In fact, as noted, a transition zone variance was granted for the billboards on Ms. Hsu's parcel and other property owners obtained variances for property surrounding the airport. *See supra* note 19. As. also noted, the FAA approved theoretical penetrations into the transition zone for the purpose of this litigation.

[23] For these conclusions, the district court relied on *Buckles v. King County*, 191 F.3d 1127 (9th Cir. 1999); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); and NRS 497.270.

testimony as described above, the court commented that Mr. Broadbent's testimony was that "he would have personally blocked any request for a variance" on the landowners' property and that the County was unable to produce any evidence that transition-zone properties could gain variances. The court ruled:

> The Supreme Court has repeatedly held that cases involving intrusions onto the land or airspace of others are different from other regulatory cases. In *Nollan*[24] . . . the Court points to the fact that not only is the landowner limited in his use of the property, but that the landowner is required to allow access onto his land for the benefit of the public and then holds that just compensation is required. The Court held that an essential right of ownership was the right to exclude others from the property. In *Loretto,*[25] the small metal boxes and cable wires/waves constitute enough of an invasion to property to fall into the *Causby*[26] type takings and require compensation.

The district court went on to determine that

> the governmental action in this case denies the Landowners the right to use the air rights and it denies the right to exclusive possession of the air rights and it allows the airport to use the air rights of the [landowners]. This results is a "per se" taking that requires just compensation.

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[24] *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987).

[25] *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).

[26] *United States v. Causby,* 328 U.S. 256 (1946).

On this basis, the court granted partial summary judgment on liability in favor of the landowners. Because per se physical takings do not implicate "exhaustion" of administrative remedies, the district court impliedly rejected the County's countermotion for summary judgment based upon the landowners' failure to seek a variance from the height restrictions.[27]

Before trial on the issue of damages, the district court ruled that the County could not present the following evidence to the jury: evidence of zoning and variance procedures, or that the case involved zoning ordinances; evidence of airport zoning height restrictions preexisting November 20, 1995, that may have impacted the landowners' property;[28] evidence related to the avigation easement Lisa Su granted to the County contingent on her request for the two billboards; any evidence relating to Ordinance Nos. 728 and 1221; and any information related to FAA issues or procedures. The district court also denied a 'majority of the County's offers of proof, including proof that the airport zoning regulations only served to trigger analysis by the FAA, and proofs concerning variances actually given.

The case proceeded to jury trial on February 27, 2001. James Himes, a real estate appraiser for the landowners, testified that the highest and best use of the property was

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[27] We note in passing that the district court's futility ruling bolstered its ultimate finding that a per se taking had occurred, *i.e.*, the court's finding that the landowners could not obtain a variance to build into the transition zone confirmed that the county took a complete easement over the landowners' property. However, as noted below, the futility and per se takings findings were made in error.

[28] November 20, 1995, was the date of taking utilized at trial.

a 400-foot hotel, concluding that the height restrictions devalued the property by $24,027,000. Himes also stated that "all hotels" could obtain a height waiver or use permit to exceed the 100-foot limit under H-1 zoning, if the proposed construction was compatible with the surrounding neighborhood. The landowners' second appraiser, Campa, concluded that the landowners were entitled to $25,000,000 of just compensation due to the height restrictions, based upon a "feasibility test" for the highest and best use in the area of the airport.

Greg Borgel testified for the County that H-1 zoning allows limited resort and apartment development, and requires a conditional use permit for gaming or structures over 100 feet in height. He stated that, in 1995, the landowners likely could have obtained a change in zoning from T-C to H-1. However, he did not believe the County would approve a conditional use permit for a 40-story/400-foot structure because of incompatibility with the character of adjacent, low-rise uses. He believed a low to mid-rise structure would have been compatible.

Shelli Lowe, an independent real estate appraiser, testified for the County that the height restrictions effectively devalued the assembled property by $5,320,000. She stated that the landowners only suffered a fourteen percent diminution in value because the restrictions caused no loss of property footage, and because they could still develop the property in the after condition, albeit under the height limitations. Consistent with pre-trial evidentiary rulings, Lowe did not testify as to the development potential of the property under the airport zoning variance process.

The jury returned a $13,000,000 verdict in favor of the landowners. Thereafter, the district court entered its final judgment in the case: $22,107,674.13 (the thirteen million dollar verdict plus prejudgment interest, costs and attorney fees),[29] with post-judgment interest to accrue daily until satisfaction of judgment. The judgment also provided a legal description of the easement, and ordered immediate deposit of the total judgment amount with the district court clerk.

The County appeals and the landowners cross-appeal. Amicus curiae briefs in support of the County's position on appeal were filed by the City of Las Vegas, the International Municipal Lawyers Association, the State of Nevada, the Airports Council International-North America, the American Planning Association and its Nevada Chapter, the Tahoe Regional Planning Agency, and the Airport Authority of Washoe County. Defenders of Property Rights, Inns Nevada, LLC, Hotels Nevada, LLC, and the Pacific Legal Foundation filed amicus curiae briefs in support of the landowners.

DISCUSSION

The County seeks reversal, in large part, based upon the district court's futility findings and its partial summary judgment order declaring that the ordinances constituted a per se physical taking under the Fifth Amendment to the United States Constitution. We review a district

[29] The district court also awarded the landowners attorney fees and costs based upon the Federal Relocation Act. Additionally, the court, reduced the jury award by the value of the avigation easement over the property for billboards. The landowners disputed this reduction.

court's grant of summary judgment and any questions of law de novo.[30] "On appeal from a summary judgment, this court may 'be required to determine whether the law has been correctly perceived and applied by the district court.' "[31] At the outset, we note that there are two general types of takings under the Fifth Amendment, takings by physical acquisition and takings by virtue of government regulation.

Lines of demarcation in this appeal

Three main issues are presented in this case: first, whether the landowners enjoyed property rights in the airspace over the assembled parcels; second, whether the height restrictions constituted a per se physical taking of an "avigation easement" over the property; and third, if no per se physical taking occurred, whether the ordinances have effected a regulatory taking of the property. Here, the County argues that the landowners enjoyed no rights in the airspace over the property, but assuming they did enjoy such rights, no taking, either physical or regulatory, occurred as a matter of law. In this, the County urges that the takings issue must be resolved under regulatory takings jurisprudence. On the other hand, the landowners argue the existence of airspace rights under state and federal law, but also argue that the height ordinances effected a per se physical taking as a matter of law. Thus,

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[30] *Pressler v. City of Reno,* 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002).

[31] *Calloway v. City of Reno,* 116 Nev. 250, 256, 993 P.2d 1259, 1263 (2000) (quoting *Mullis v. Nevada National Bank,* 98 Nev. 510, 512, 654 P.2d 533, 535 (1982)).

the landowners contend that the laws governing regulatory takings are not at all implicated.[32]

Accordingly, the parties urge diametrically opposed legal constructs as governing the resolution of this appeal, and both sides claim that they are entitled to a determination on the takings issue as a matter of law.

Because the cases cited by both parties are factually intensive, and because different states have applied discrete state constitutional and state policy considerations to such claims, we must determine under the evidence presented below whether either side is entitled to judgment as a matter of law on the takings issue.

We conclude that the district court erroneously determined that the ordinances passed in aid of the various airport expansions over the years since 1955 effected a per se physical taking of the subject properties. We also conclude that this case raises regulatory takings issues, not per se physical takings issues. Generally, subject to certain exceptions, a landowner must first pursue, or exhaust, all available administrative remedies in order to establish a regulatory taking. Thus, before undertaking any analysis of the regulatory takings issue, we must resolve whether the landowners were required to take advantage of the variance process. As discussed below, we conclude that the district court also erred in determining, as a matter of law, that any attempts at approval of a high-rise project would have been futile,[33]

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[32] The landowners alternatively argue that the partial summary judgment was correct in its result under a regulatory takings analysis.

[33] The order granting partial summary judgment finding that a per se taking occurred rendered the previous futility finding moot with

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and also conclude that the landowners' failure to seek regulatory redress in this instance is fatal to a regulatory takings claim. In this we recognize that the ordinances may have limited the possible range of development on the subject assembled parcels, but we cannot conclude that a regulatory taking has occurred because the landowners failed to submit a meaningful and concrete plan for high-rise development for County approval. Therefore, the failure to exhaust administrative remedies provided by the variance processes set forth in the ordinances renders the entire controversy unripe. Accordingly, we reverse the district court's judgment and remand this matter for exhaustion of administrative remedies. Once that process is completed, the district court may consider the takings issue under *Penn Central Transportation Company v. New York City*,[34] the seminal authority defining landowner rights in the context of regulatory takings claims.

Property interest

The County contends that the district court erred in failing to conduct a preliminary investigation addressing whether the landowners owned a vested property right in the airspace above the property. We disagree.

NRS 37.010(14) recognizes that eminent domain may be exercised for "[a]irports, facilities for air navigation and aerial rights-of-way." Additionally, while NRS 493.030 declares state government sovereignty in the airspace

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respect to the trial proceedings. Exhaustion of administrative remedies is only pertinent to a regulatory takings case.

[34] 438 U.S. 104 (1978).

above the land and water in the State of Nevada,[35] NRS 493.040 qualifiedly vests ownership of the space above land and water in the owners of that property, subject to the right of flight.[36] Thus, the landowners owned the airspace above their property, subject to intrusion by lawful air flight.

NRS 493.050(1)(a) states that air flight is lawful unless it interferes with the "then existing use to which the land or water, or the space over the land or water, is put by the owner." Therefore, airplanes may fly over the landowners' property so long as they do not interfere with the current use of the property.[37] NRS 493.030, NRS 493.040 and NRS 493.050 do not eliminate the landowners' right to their airspace. Thus, the district court properly found that the landowners held a property right in the

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[35] NRS 493.030 states:

> Sovereignty in the space above the lands and waters of this State is declared to rest in the state, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the State.

"Sovereignty" is defined, in part, as "freedom from external control" or "one that is sovereign, especially an autonomous state." *Merriam-Webster's Collegiate Dictionary* 1125 (10th ed. 1993).

[36] NRS 493.040 states:

> The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in NRS 493.050.

"Ownership" is defined as "the state, relation, or fact of being an owner." *Merriam-Webster's Collegiate Dictionary* 1125 (10th ed. 1993).

[37] While the County contends it obtained a prescriptive easement over the airspace, we conclude that the facts of this case did not establish the existence of such an easement. The ordinances in question do not constitute an adverse occupation of the airspace in this case.

airspace above their property.[38] However, this conclusion does not, of necessity, result in a right of compensation under state or federal law.[39] We must therefore consider whether the district court applied the correct legal analysis in granting summary judgment on liability.

Physical and regulatory takings

The United States and Nevada Constitutions require the payment of "just compensation" when private property is taken for public use.[40] Before 1922, "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a

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[38] The County also argues that the landowners never obtained a vested property right in their airspace because they failed to obtain zoning or use permit approvals to undertake a project to use the airspace, and thus their airspace was not constitutionally protected from uncompensated takings. This argument lacks merit. NRS 493.040 vests the ownership in the space above land and water in the owners of that property.

[39] *See, e.g., Penn Central,* 438 U.S. at 130 (landowners argued that regulations prohibiting construction of a high-rise office building deprived them of "air rights"; Court concluded that landowners could not establish a taking simply by showing they were denied the ability to use a property interest they previously believed was available for development); *see also Hadacheck v. Los Angeles,* 239 U.S. 394 (1915) (ordinance valid although it prohibited highest and best use of property as a brickyard).

[40] [P]rivate property [shall not] be taken for public use, without just compensation"; U.S. Const. amend. V. "Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made." Nev. Const. art. 1, § 8, cl. 6.

'practical ouster of [the owner's] possession.'"[41] However, in *Pennsylvania Coal Co. v. Mahon*, the United States Supreme Court determined that state regulation of property may also require just compensation, observing that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[42] Thus, two categories of takings may occur for which just compensation is required: "physical takings," where the government physically occupies or invades property or authorizes another to do so; and "regulatory takings," where government regulation goes "too far." In a physical taking, government has an automatic categorical duty to compensate an affected property owner to the extent of the intrusion. With regard to regulatory takings, not all situations in which government has removed some value from property by regulation require compensation.[43] As the Court has noted, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[44] A trial court must draw a discrete balance[45]

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[41] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (quoting *Legal Tender Cases*, 12 Wall. 457, 551 (1871)) (quoting *Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879)).

[42] 260 U.S. 393, 415 (1922).

[43] See *William C. Haas v. City & Cty. of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (zoning regulations were not a taking although they reduced the value of property from $2,000,000 to $100,000).

[44] *Pennsylvania Coal*, 260 U.S. at 413.

[45] *See Marshall v. Dept. of Water and Power*, 268 Cal. Rptr. 559, 568 (Ct. App. 1990) (" '[t]he determination of whether an inverse taking has occurred is a nonjury question, even when there are factual questions involved' ") (quoting *Redevelopment Agency v. Tobriner*, 200 Cal. Rptr 364, 370-71 (Ct. App. 1984)); *see also San Diego Gas & Elec. Co. v. Superior Ct.*, 920 P.2d 669, 705 (Cal. 1996); *Cumberland Farms, Inc. v. Town of Groton*, 808 A.2d 1107, 1124-27 (Conn. 2002); *Foster v.*

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based upon judgment and logic to determine when a land use regulation effects a compensable taking.[46]

Physical occupations and invasions

Physical occupation and invasion cases are "relatively rare [and] easily identified,"[47] and "[w]hen the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed."[48] For situations where the government specifically condemns or physically occupies property, straightforward per se rules apply.[49] Such an occupation effects a taking "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal

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City of Gainesville, 579 So.2d 774, 776 n.2 (Fla. Dist. Ct. App. 1991); *Rueth v. State*, 596 P.2d 75, 94-95 (Idaho 1979); *Van Dissel v. Jersey Central Power & Light Co.*, 438 A.2d 563, 568-69 (N.J. Super. Ct. App. Div. 1981); *Alevizos v. Metropolitan Air. Com'n of Mpls. & St. P.*, 216 N.W.2d 651, 660-61 (Minn. 1974). *But see Monterey v. Del Monte Dunes at Monterey. Ltd.*, 526 U.S. 687 (1999) (jury trial required in 42 U.S.C. § 1983 action on question of whether landowner had been denied all economically viable use of land); *Thornburg v. Port of Portland*, 415 P.2d 750, 752-53 (Or. 1966) (jury decides whether interference with use and enjoyment of land is sufficiently substantial to result in a loss of value and therefore constitute a taking).

[46] *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 1986) (in determining where mere regulation ends and taking begins, the Court relies " 'as much [on] the exercise of judgment as [on] the application of logic' ") (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)).

[47] *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 324 (2002).

[48] *Id.* at 322 n.17.

[49] *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 233 (2003).

economic impact on the owner."[50] Thus, the government "has a categorical duty to compensate the former owner."[51]

The United States Supreme Court has held in several situations that just compensation was due for a per se physical invasion or occupation, as when government dams a river and floods upland parcels,[52] government seizes and operates a coal mine,[53] airplanes make frequent and low over-flights of property,[54] government attempts to require public access to private property,[55] or when government authorizes a cable company to install cable boxes on apartment buildings.[56] However, other measures taken by government have not resulted in physical takings, *e.g.*, mobile home rent control ordinances restricting evictions,[57] ordinances requiring a shopping center to permit distribution of literature on its property during business hours,[58] or when buildings are damaged during riots while under the protection of federal officers.[59]

Here, in determining that the zoning ordinances expanding the McCarran transition zone effected a per se

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[50] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

[51] *Tahoe-Sierra*, 535 U.S. at 322.

[52] *United States v. Cress*, 243 U.S. 316 (1917); *Pumpelly v. Green Bay Company*, 80 U.S. 166 (1871).

[53] *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).

[54] *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946).

[55] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[56] *Loretto*, 458 U.S. 419.

[57] *Yee v. Escondido*, 503 U.S. 519 (1992).

[58] *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

[59] *YMCA v. United States*, 395 U.S. 85 (1969).

physical taking of the landowners' property, the district court observed that "[t]he Supreme Court has repeatedly held that cases involving intrusions onto the land or airspace of others are different from other regulatory cases." In reaching this conclusion, the district court performed a combined analysis of the United States Supreme Court's per se takings overflight cases, *United States v. Causby*[60] and *Griggs v. Allegheny County*,[61] with *Loretto v. Teleprompter Manhattan CATV Corp.*,[62] a case involving a physical occupation of property, and *Nollan v. California Coastal Commission*,[63] a case involving an easement imposed by government authorities as a condition to issuance of a building permit. While the district court's analysis of the *Causby*-type overflights cases, the *Loretto*-type physical occupation cases, and the *Nollan*-type dedication/exaction cases was a novel approach, the district court erred in its amalgamated reliance upon them.

The United States Supreme Court's physical takings cases involving overflights show a common theme: that when frequent and low airplane overflights substantially devalue the current use and enjoyment of property, a compensable event occurs. In *Causby*, a chicken farming business was destroyed after low and frequent overflights by military aircraft caused the chickens to reduce egg production and to die from fright.[64] The Court noted that, if the flights rendered the farmer's land uninhabitable, it

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[60] 328 U.S. 256.

[61] 369 U.S. 84.

[62] 458 U.S. 419.

[63] 483 U.S. 825 (1987).

[64] *Causby*, 328 U.S. at 259.

would be as if the government "had entered upon the surface of the land and taken exclusive possession of it."[65] Certainly, the limitation on the land's utility profoundly diminished its value.[66] The Court therefore held that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."[67] Because the findings of the lower court in *Causby* established that the flights directly caused the diminution in value, the Court agreed that a servitude had been placed upon the land for which the farmer was entitled to compensation.[68]

In *Griggs*, the Court considered whether a county-operated airport took an easement over a house through noise and air pollution from frequent and low overflights.[69] The Court noted that "use of land presupposes the use of some of the airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of the 'superadjacent airspace' will often 'affect the use of the surface of the land itself.'"[70] Based upon evidence that the homeowners abandoned their residence because they became "nervous and distraught"

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[65] *Id.* at 261.

[66] *Id.* at 262.

[67] *Id.* at 266.

[68] *Id.* at 266-67.

[69] *Griggs*, 369 U.S. at 85, 87. The Court stated that the holding in *Causby* was "that the United States by low flights of its military planes over a chicken farm made the property unusable for that purpose and that therefore there had been a 'taking,' in the constitutional sense, of an air easement for which compensation must be made." *Id.* at 88.

[70] *Id.* at 89 (citation omitted) (quoting *Causby*, 328 U.S. at 265).

from extreme noise generated by airplane overflights,[71] the Court held that a compensable event had taken place.[72]

In *Causby* and *Griggs,* landowners presented evidence of frequent and low overflights, which diminished the value of the existing use of their property. Thus, other courts have interpreted *Causby* and *Griggs* to require that a prima facie case for inverse condemnation based upon a physical taking must include evidence of low and frequent overflights causing a direct and immediate interference with the enjoyment and use of the land.[73] We agree. *Causby* and *Griggs* did not concern the regulation of property as implied by the district court, but rather the resultant, effect of overflights upon subjacent land. In actuality, *Causby* and *Griggs* are physical takings cases.

The landowners in this instance chose not to pursue their noise claim and presented insufficient evidence of direct overflights to establish a case under *Causby* or *Griggs.*[74] The only evidence the landowners provided to the

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[71] *Id.* at 87.

[72] *Id.* at 90; *see also id.* at 91 (Black, J., dissenting) (agreeing "with the Court that the noise, vibrations and fear caused by constant and extremely low overflights in this case have so interfered with the use and enjoyment of petitioner's property as to amount to a 'taking' of it under the *Causby* holding").

[73] *See Brown v. U.S.,* 73 F.3d 1100 (Fed Cir. 1996); *Village of Willoughby Hills v. Corrigan,* 278 N.E.2d 658 (Ohio 1972).

[74] *See Brown,* 73 F.3d at 1104, which states:

> [U]nlike a government invasion of the surface land itself, an invasion of airspace above surface land does not *per se* constitute a taking. However, under *Causby* and its progeny, once the surface owner proves that low-level overflights result in direct, immediate, and substantial interference with the enjoyment and use of the property,

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district court regarding overflights was Dunlay's testimony that overflights might occur, but at what interval he did not know. While the landowners may be able to establish a *Causby* type takings case in the future, Dunlay's testimony was insufficient to establish a physical invasion or occupation requiring just compensation. Further, it is undisputed that the use of the property in the "before" condition has remained unaffected by the ordinances and, certainly, the height restrictions have not displaced these landowners. Thus, the district court erred in relying upon *Causby* and *Griggs*.

The district court also erroneously relied upon *Loretto*. In that case, a New York statute required landlords to permit a cable television company to install cables and junction boxes in their buildings. The landowner in *Loretto* did not discover the cables until after purchasing the building. The Court concluded that the installed cable constituted a permanent physical occupation, which required compensation. The Court narrowly defined its holding to "affirm the traditional rule that a permanent physical occupation of property is a taking."[75] In the present case, the district court viewed the zoning ordinances not as valid height restrictions, but rather as

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the owner establishes a taking for which the Constitution mandates just compensation.

See also La Salle National Bank v. County of Cook, 340 N.E.2d 79, 89 (Ill, App. Ct. 1975) (considering an airport height zoning ordinance and noting that "interpreting overflights as 'takings' within the meaning of the fifth amendment would seem to be more the exception than the rule").

[75] *Loretto*, 458 U.S. at 441; *see also Kaiser Aetna*, 444 U.S. 164 (government attempt to grant public access to a private marina without cost).

permitting physical occupation of the property through airplane overflights. The County ordinances at issue did not permit third parties (airplanes) to use or occupy the landowners' property to the extent that a per se physical taking has occurred, however, because NRS 493.050[76] establishes a right of flight across private property in Nevada.[77] Thus, *Loretto* is inapposite to this inquiry.

The district court also relied upon *Nollan* for its analysis of the County ordinances. In *Nollan,* property owners sought a permit to replace a beachfront home with a larger one. The California Coastal Commission conditioned issuance of the permit on the transfer of an easement that would allow public access to adjacent public beaches. The rationale for the condition was protection of the public's ability to see the beach, and that the larger structure would worsen the visual barrier between a public road serving the area and the beaches and, thus, create a "psychological barrier" to beach access.

The Court noted that, had the California Coastal Commission simply and unconditionally required the Nollans to convey an easement across their property, eminent domain principles would have been implicated;[78] but that, because the Coastal Commission could forbid construction altogether, it could also impose conditions on construction in harmony with the police power considerations empowering it to deny construction permits without

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[76] *See also* 49 U.S.C. § 40103 (2000).

[77] *Cheyenne Airport Bd. v. Rogers,* 707 P.2d 717, 722-25 (Wyo. 1985) (airport zoning ordinances did not permit overflights; rather, permission came from state and federal statutes permitting aircraft navigation).

[78] *Nollan,* 483 U.S. at 836.

running afoul of the Fifth Amendment. From this, the Court reasoned that a condition would be valid, *i.e.*, no inverse condemnation would occur, if, for example, it required the property owners to provide or dedicate a viewpoint on their property for passersby to see the ocean,[79] but that [t]he evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[80] Under these principles, the Court went on to hold that requiring an easement as a condition for permit approval constituted a taking because the dedication of the easement bore no "essential nexus" to the harm the local government sought to address, *i.e.*, the easement did not improve the view.[81]

The case before us does not concern exaction of a condition to the approval of a development proposal. Rather, the ordinances at issue here are of general applicability to airport area property owners and constitute a legitimate exercise of the County's police powers to prevent public hazards.[82] While the County may at some

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[79] *Id.* at 836-37.

[80] *Id.* at 837.

[81] *Id.* at 838-41 (holding in part that the commission's, imposition of the access-easement condition could not be treated as an exercise of land-use police power since the condition did not serve public purposes related to the condition; – of the rationales put forth to justify the condition, protection of the public's ability to see the beach and ameliorating a "psychological barrier" to beach use, none was plausible); *see also Dolan v. City of Tigard,* 512 U.S. 374 (1994) (government must demonstrate that condition sought for granting a development permit meets essential nexus test and is roughly proportional to the problem created by development).

[82] Of course, each parcel in the area may be affected by the ordinances in different ways and to different extents, depending upon location.

future time exact conditions on granting a variance to construct a hotel/casino that would constitute a taking, the landowners have not yet attempted to obtain such a variance.[83] Thus, while *Nollan* is a physical takings case, it is not implicated in this matter and the district court erred in relying on it.

The landowners rely upon several state court decisions to support their argument that airport height restrictions effect a per se physical taking of property. However, many of the cases cited by the landowners do not support the proposition that, in and of themselves, airport height ordinances automatically create a right of compensation. The affected parties in some of the cases alleged or presented sufficient facts to state a cause of action, *i.e.*, frequent and low overflights;[84] in others, which are actually regulatory takings cases, the airport height regulations completely deprived the landowner of any beneficial use in the property,[85] the regulating body attempted to

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[83] *See* discussion of regulatory takings below.

[84] *Sneed v. County of Riverside,* 32 Cal. Rptr. 318 (Ct. App. 1963) (court overruled demurrer to complaint for inverse condemnation; complaint stated causes of action by alleging low and frequent overflights and through airport zoning height regulation); *Ackerman v. Port of Seattle* 348 P.2d 664 (Wash. 1960), *abrogated by Highline Sch. Dist. No. 401, King Cty. v. Port of Seattle,* 548 P.2d 1085 (Wash. 1976) (overruling a district court's dismissal of property owners' complaint and holding that frequent and low overflights over property amounted to a taking). *But see United States v. 48.10 Acres of Land, Etc.,* 144 F. Supp. 258, 265 (S.D.N.Y. 1956) (federal government required to pay for devaluation of property following height restrictions and an easement it purchased because property was less valuable for residential development due to easements).

[85] *Peacock v. County of Sacramento,* 77 Cal. Rptr. 391 (Ct. App. 1969) (airport zoning ordinance and subsequent government action that

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pass retroactive limitations on property,[86] or the regulatory body lacked statutory authority to pass airport zoning ordinances to restrict structure height and the use of property.[87] We conclude that a rule supporting the notion that airport height-restriction ordinances, of necessity, effect per se physical takings, is overbroad in its reach and thus, not in harmony with the condemnation laws of this state.[88] We therefore embrace the modern trend that airport height zoning ordinances, as a valid exercise of

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prevented landowner from any development and left landowner with no beneficial use in property for several years was a compensable taking).

[86] *Ky. Airport Zoning Com'n v. Ky. Power Co.*, 651 S.W.2d 121 (Ky. 1983) (court concluded that the airport zoning commission could not impose regulations retrospectively; to enforce its orders, the zoning commission was required to pay just compensation).

[87] *Yara Engineering Corporation v. City of Newark*, 40 A.2d 559 (N.J. 1945) (state enabling statute did not give city authority to pass airport zoning ordinances; accordingly, such ordinances interfered with existing property rights requiring compensation to affected landowners).

[88] *But see Roark v. City of Caldwell*, 394 P.2d 641 (Idaho 1964) (holding that airport height ordinance was not a valid exercise of police power because it took property for a public use without just compensation); *Indiana Toll Road Commission v. Jankovich*, 193 N.E.2d 237 (Ind. 1963) (structures and toll road encroached into an airport height limitation zoning area – court concluded that limitation was not an exercise of police power, but a taking for public use); *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980) (because zoning regulations were designed to benefit a specific government enterprise, landowners who suffered a substantial diminution in the value of their property were entitled to compensation); *Jackson Municipal Airport Authority v. Evans*, 191 So. 2d 126 (Miss. 1966) (although finding that airport zoning ordinance was generally valid, airport authority could not remove the tops of trees that grew into a restricted height elevation without paying compensation).

police power, are not the definitional equivalent of a per se physical taking.[89]

In this instance, there was no per se physical taking as there was no actual physical appropriation of, or physical ouster from, the airspace or any other portion of the subject property. First, the property was and could be further developed within the height restrictions.[90] Second, the landowners could still conceivably develop structures within the affected airspace via the variance process.[91] Additionally, no avigation easement was created by the

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[89] *See Harrell's Candy Kitchen v. Sarasota-Manatee Air. A.*, 111 So. 2d 439, 443 (Fla. 1959) (upholding validity of airport height restrictions without payment of just compensation. The court stated, "We can think of no situation which more clearly authorizes the exercise of . . . the police power than that involved here. Such regulations not only promote the general welfare of the state and community served but, contribute to the proper and orderly development of land areas in the vicinity of airports. Such regulations stabilize values and provide safety to those who use the airport facilities in taking off and landing as well as those living in the vicinity thereof"); *La Salle National Bank*, 340 N.E.2d 79 (airport height zoning regulations were a proper exercise of police power to protect the public from air hazards; the regulations were not an appropriation of private property for public use); *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659 (Iowa 1992) (airport zoning ordinance did not create a physical invasion taking); *Village of Willoughby Hills*, 278 N.E.2d 658 (regulations were a proper exercise of police power and no compensable taking because landowners did not allege low and frequent flights over their property); *Cheyenne Airport Bd.*, 707 P.2d 717 (ordinances did not create flight easement; rather, they were created by state and federal declarations of navigability and ordinances were a proper exercise of police power to protect the easement from surface activities); *see also* Clyde L. MacGowan, Note, *Airport Zoning as a Height Restriction*, Vol. 13 Hastings L.J. 397 (1962) (urging courts to uphold the validity of height zoning as a proper exercise of the police power).

[90] *See supra* note 19.

[91] *Id.*

ordinances in question here. Under *City of Austin* and *Brondum,* a general right to fly over property does not necessitate an easement but, rather, an avigation easement is created by low and frequent overflights amounting to a taking of the property.[92] As noted in our discussion of *Causby,* such was not established as to the subject property. These ordinances, which did not create an avigation easement as to the subject property, are in reality height restrictions not amounting to a physical taking. As noted above, the fact that no per se physical taking was established does not end our analysis in this matter.

Regulatory takings

As discussed above, two general takings categories exist: physical and regulatory. Thus, even when government does not physically "take" property, but rather regulates the use of property, the property owner may still be entitled to just compensation if the regulation goes "too far." Two regulatory taking analytical constructs have emerged: categorical regulatory takings, and takings resolved under an ad hoc factual analysis pursuant to *Penn Central.*[93]

A categorical regulatory taking occurs when a regulation deprives land of all economically beneficial or productive use and, as with per se physical takings, the only issue to resolve at trial is damages.[94] Additionally, a

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[92] *See supra* note 6.

[93] 438 U.S. 104.

[94] *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015 (1992). However, the Court provided that, even if a regulation removes all economic value from property, a compensable taking may

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categorical or per se regulatory taking may occur if the regulation fails to substantially advance a legitimate government interest.[95]

We conclude that no categorical regulatory taking has been shown in this instance. First, the landowners did not allege that the County ordinances deprived them of their property's entire economic value; they conceded below that an economically viable use of their property remains in spite of the height restrictions. Second, the landowners conceded below that the ordinances were a legitimate exercise of the County's police power. Third, it is not clear, without exhaustion of administrative remedies by the landowners, whether and the extent to which the zoning

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not occur if "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027; *see also Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978) (discussing the three-part ad hoc factual analysis utilized in the absence of a per se physical taking or a categorical regulatory taking).

[95] *Lucas,* 505 U.S. at 1016; *Agins v. Tiburon,* 447 U.S. 255, 260 (1980). *But see Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 732 n.2 (1999) (Scalia, J., concurring in part and concurring in the judgment) (expressing no view as to the propriety of the legitimate government interest test); *id.* at 753 n.12 (Souter, J., concurring in part and dissenting in part) ("I offer no opinion here on whether *Agins* was correct in assuming that this prong of liability was properly cognizable as flowing from the Just Compensation Clause of the Fifth Amendment, as distinct from the Due Process Clauses of the Fifth and Fourteenth Amendments."); *Eastern Enterprises v. Apfel,* 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (suggesting that *Agins'* legitimate government interest test is one more appropriately considered under general due process principles than the Takings Clause). Thus, it is possible that the Court no longer recognizes the legitimate government interest test as viable in the context of a regulatory takings analysis. However, because we do not rest our decision on this test, we need not express our views concerning its continuing validity.

ordinances here have denigrated the economic value of the airspace in question.

Because the landowners did not establish or attempt to assert a categorical regulatory takings case, we must examine the ordinances to determine whether the landowners are entitled to just compensation under the fact-based analysis provided by the United States Supreme Court in *Penn Central.*

The Supreme Court has not provided a "set formula to determine where regulation ends and taking begins."[96] In *Penn Central,* the Court established three guideposts for examination of whether a regulation, that does not deprive the owner of all viable economic use, effects a compensable partial taking: (a) the regulation's economic impact, (b) the regulation's interference with investment-backed expectations, and (c) the character of the government action.[97] All relevant facts are considered on an ad hoc basis. The Court has instructed that, in examining whether a taking has occurred, a reviewing court must consider the property as a whole.[98] Additionally, an allegation that a regulation

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[96] *Goldblatt v. Hempstead,* 369 U.S. 590, 594 (1962).

[97] *Penn Central,* 438 U.S. at 124.

[98] *Id.* at 130-31 ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, [the] Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."). Thus, the denominator for takings analysis is the parcel of property as a whole and not portions of property. *See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 331 (2002) (district court erred by disaggregating property into a thirty-two month segment of time from the remainder of the property

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has diminished the property's value, or destroyed the potential for its highest and best use, does not, without more, constitute a taking.[99]

While the *Penn Central* ad hoc approach is the proper legal framework for an analysis of whether the landowners in this matter are entitled to compensation, we cannot yet consider the landowners' taking claim, as their case is not yet ripe for review on the merits. We require an actual case or controversy as a predicate to judicial relief.[100] "We will decide only actual controversies, in which the parties are adverse and the issues ripe."[101] An unripe case presents a situation where there is no concrete controversy and an alleged injury is merely speculative.[102]

A regulatory takings claim under *Penn Central* is generally not ripe without a "final decision" regarding the

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owner's fee simple estate and considering whether property owners were deprived of all economically viable use during that period).

[99] *See Euclid v. Ambler Co.*, 272 U.S. 365 (1926) (regulations valid although they effected a seventy-five percent diminution in value of property); *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915) (ordinance prohibiting highest and best use of land as a brickworks was valid, although it reduced the value of property from $800,000 to $60,000); *William C. Haas v. City & Cty. of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (zoning regulations were not a taking although they reduced the value of property from $2,000,000 to $100,000).

[100] *Resnick v. Nevada Gaming Commission*, 104 Nev. 60, 65-66, 752 P.2d 229, 233 (1988).

[101] *Boulet v. City of Las Vegas*, 96 Nev. 611, 613, 614 P.2d 8, 9 (1980).

[102] *Resnick*, 104 Nev. at 65-66, 752 P.2d at 232-33.

property owner's ability to develop its property.[103] In *Williamson Planning Comm'n v. Hamilton Bank*, the Supreme Court observed:

> Our reluctance to examine taking claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause. Although "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty, this Court consistently has indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.[104]

The final decision requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer."[105] Accordingly, without a final

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[103] *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190, 195 (1985) (two-part test for ripeness prior to seeking federal relief on a as applied basis: (1) the agency charged with administering the challenged ordinances must have reached a final decision regarding the application of the regulations to the property at issue, and (2) the plaintiff has sought compensation through available state procedures); *see also Daniel v. County of Santa Barbara*, 288 F.3d 375, 381 (9th Cir. 2002).

[104] 473 U.S. at 190 (citations omitted).

[105] *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 738 (1997); *see also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S.

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regulatory decision applying the challenged regulation, a court cannot evaluate the economic impact of the regulation with regard to the extent it interferes with reasonable investment-backed expectations and, thus, cannot conduct the *Penn Central* examination without resorting to speculation.[106] A final decision requires, at a minimum, "(1) a rejected development plan, and (2) a denial of a variance."[107] Further, the application for development must be one that is meaningful, *i.e.*, not one that is for "exceedingly grandiose development."[108] Additionally, government "may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[109]

A limited exception exists to "the final decision [exhaustion] requirement if attempts to comply with that requirement would be futile."[110] However, as one court has explained, a landowner seeking to establish futility carries

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340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.")

[106] *Hamilton Bank*, 473 U.S. at 191.

[107] *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454, 1455 (9th Cir. 1987) (even if a landowner has submitted development plans and been rejected, an applied regulatory taking case might still not be ripe; a landowner must submit a "meaningful" application for development.); *see MacDonald*, 477 U.S. at 352 n.8, 353 n.9 (the rejection of "exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews").

[108] *Kinzli*, 818 F.2d at 1455 (the futility exception is not triggered until at least one meaningful application for development is submitted and rejected; "[a] 'meaningful application' does not include a request for 'exceedingly grandiose development") (quoting *MacDonald*, 477 U.S. at 353 n.9).

[109] *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001).

[110] *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988); *see also Strickland v. Alderman*, 74 F.3d 260, 265 (11th Cir. 1996).

the burden of proving that the exception applies. The landowner must establish that the potential denial of a development permit is more than a mere possibility; rather, "a sort of inevitability is required: the prospect of refusal must be certain (or nearly so)."[111] Thus, for example, in *Lucas,* the Court noted that it would have been futile for the landowner to submit a request for a "special permit" when the regulatory agency stipulated that it would not grant such a permit.[112]

The district court in this case erred by ruling that the futility exception applied and that the landowners were excused from exhausting their administrative remedies. The district court's futility determination was erroneous as a matter of law because the district court (1) placed too much reliance in its futility findings upon the County's ruling on the 1981 variance request by predecessor landowners, a ruling entered some fourteen years prior to the date of valuation in this dispute; (2) failed to consider whether any meaningful alternative for development over and above the existing use in 1995 might be approved through the ordinance variance process;[113] and (3) apparently determined the transition zone surface to be an impenetrable line for development purposes. While the landowners are correct that McCarran opposed the 1981 variance request, they are incorrect in arguing that the denial of the request occurred because of McCarran's opposition. The record of the Board of Commissioner's

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[111] *Gilbert v. City of Cambridge,* 932 F.2d 51, 61 (1st Cir. 1991) (citations omitted).

[112] *Lucas,* 505 U.S. at 1012 n.3.

[113] It appears by implication that the district court believed that if would have been futile to apply for *any* variance.

meeting reveals that the predecessor landowners agreed to height restrictions requested by the airport. The Board, however, apparently denied the variance request because the predecessor landowners refused to pay the moving costs of the mobile home tenants on the property. As noted in the margin, above, the ruling was suggestive of the fact that the County would not override airport recommendations or objections to a project, where the objections were based upon transition-zone restrictions. However, given the total body of evidence on this point, the 1981 rejection by the County does not establish that it would have denied any application for a variance.

We note that the district court did not consider former Aviation Director Broadbent's deposition testimony in making the original futility findings., His deposition was only later used to bolster the landowners' takings argument in support of partial summary judgment and to oppose the County's renewed attack on the ripeness of their claims.[114] As noted, Mr. Broadbent testified that the airport routinely opposed height restriction variances whenever the FAA interpreted a proposed structure as hazardous to aircraft navigation. He could not recall a situation during his tenure at the airport where the Clark County Commission approved an application for a variance or special use permit over an adverse FAA determination.

The district court, in its summary judgment order reciting the landowners' arguments, stated:

> As to the issue of a "variance," it is inapplicable because this is not a regulatory taking so

[114] *See supra* note 33.

> there is no necessity for "finality." Additionally, this Court has already ruled that to make application would be futile especially in light of the fact that the prior owner did make application and was rejected for a 240 foot structure. Additionally, the former Airport Director, Robert Broadbent testified that he would have personally blocked any request for a variance for this property. The County fails to mention that no properties in the Transition Zone have been granted a variance.

The district court's order does not precisely track the equivocal testimony of Mr. Broadbent and was made without the benefit of the subsequent pre-trial offer of proof showing other variances.[115] While one might infer from Mr. Broadbent's statements that McCarran would have opposed any variance application for the property and this opposition would result in a variance denial, the entire context of Mr. Broadbent's testimony suggests that airport opposition to development proposals was tied to FAA objections concerning hazards to air navigation. Also, as noted, the record does not support a conclusion that it would have been futile for the landowners to request a variance. First, the landowners gained a variance in the transition zone for their billboards. Second, evidence from the pre-trial offer of proof found in the record discloses that other property owners have gained variances to construct structures that not only exceed the transition slope, but also extend into the approach zone.[116] Third, Mr.

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[115] *See supra* note 19.

[116] We again note that the information later provided in the County's pre-trial offer of proof was not provided to the district court at the time of its pre-trial rulings on the takings and futility issues. We also note that the district court rejected the offer of proof, ostensibly

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Broadbent testified that he could not remember the County ever going against McCarran's recommendation *if* the airport could show that the FAA supported its recommendation. Fourth, the record indicates that the FAA would have permitted at least some development on the subject property that would penetrate the transition slope.

The FAA responded to the landowners' hypothetical plans, indicating that, while the landowners' proposed structure exceeded the transition slope by 148 feet, it would have no impact on aeronautical operations if lowered by seventy-one feet (*i.e.*, to a height seventy-seven feet into the transition zone). More particularly,

> [i]t should be understood . . . that a penetration of a FAR Part 77 imaginary surface is not reason to determine a structure to be a hazard to air navigation. This is just an indication that further study is required to determine the exact impact the structure would have on aeronautical operations.

Accordingly, the mere fact that a proposed structure may exceed the slope of a height restriction zone is apparently insufficient for the FAA to conclude that the structure will present an aircraft navigation hazard. Thus, the transition zone was, at least ostensibly, permeable through the variance process.[117] However, a determination as to how far a structure could exceed the zone was subject to FAA analysis and a final decision on a variance request by the

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because it had resolved the futility and takings issues. However, the variances noted in the offer of proof support the other evidence in the record undermining the district court's futility and takings rulings, both of which were subject to revision at any time under NRCP 54(b).

[117] *See supra* note 19.

County Commission. In light of the above, we conclude that whether the current Board of County Commissioners would permit a variance remains to be seen.

We also note that the landowners apparently had no concrete plans to develop the assembled parcels to submit for exhaustion of their administrative remedies, here the variance process. Tien Fu Hsu stated he held no formal plans to develop his corporate and non-corporate parcels into a hotel/casino. Lisa Su testified that she did not attempt to develop the property because she lacked the funds to do so, and had no specific plans to develop the property, except in a generalized sense, which she discarded.

It was incumbent upon these landowners to submit a meaningful application for development and resort to the variance process to determine whether, and to what extent, they could penetrate the transition zone. Their failure to do so prevents any analysis as to whether the ordinances went too far in frustrating the investment-backed expectations in assembling the subject parcels, and whether the County would have approved a realistic variant use for the landowners' property. Accordingly, the controversy below was not justiciable because a taking in this case can only be established under a *Penn Central* analysis, and such an analysis cannot be judicially undertaken without a controversy that is ripe for decision. Because the takings issue should have been resolved under *Penn Central,* and because the *Penn Central* issue was not ripe for a decision, the district court erred in not dismissing the action below. However, given the passage of time since the trial, recognizing that the landowners may now be in a position to submit meaningful plans for the further development of the assembled parcels to the FAA and the County, we have determined to reverse and remand this case for further proceedings consistent with

this order. Upon remand, the landowners may, if they so choose, submit meaningful development plans to the County with an application for a variance. If the County denies their application and a "final decision" results, the landowners may bring their case back to district court for adjudication of whether a *Penn Central*-type regulatory taking has occurred through the application of the County ordinances to their property.[118] If an attempt at exhaustion is not made on remand, the district court is instructed to dismiss the matter without prejudice. Based on our conclusion that the landowners' case is not yet ripe for judicial determination, we need not consider the County's remaining arguments, and we dismiss the landowners' cross-appeal as moot.

Finally, in the event the landowners, on remand, exhaust their administrative remedies, the district court must conduct an evidentiary hearing on the takings issue in which any party may introduce a full body of relevant evidence to a regulatory taking. In a regulatory taking case, several formerly excluded facts become relevant in aid of the district court's determination of the takings issue: the landowners' knowledge of the height restrictions when they purchased their property, their development intentions and steps they took to effect these intentions, the feasibility of constructing a viable high-rise hotel/casino, the purchase price of the properties, the variance procedures under the airport zoning ordinances and other County ordinances affecting the property, preexisting height restrictions on the property, and the

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[118] We conclude that any failure on remand to exhaust administrative remedies through a variance process will not constitute an abandonment of the action for the purposes of awarding attorney fees and, costs under NRS 37.180.

FAA's role in the variance process. In the further event that the district court finds a regulatory taking to have occurred, a jury may then determine the question of damages, to wit: the extent to which the reasonable investment-backed expectations have been impaired.[119]

CONCLUSION

The district court erroneously concluded that the County's height-restriction ordinances created a per se physical taking of the landowners' property. Although ordinances like those at issue in this case may potentially give rise to a fact-based regulatory taking, we cannot conclude at this time whether the application of the County's regulations to their property requires just compensation, as this case is not yet ripe for review on the merits. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[120]

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[119] *See supra* note 45.

[120] The Honorable Cliff Young, Senior Justice, was appointed by the court to sit in place of the Honorable Miriam Shearing, Chief Justice. Nev. Const. art. 6, § 19; SCR 10. The Honorable Jerome M. Polaha, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of the Honorable Robert Rose, Justice. Nev. Const. art. 6, § 4.

The Honorable Myron E. Leavitt, Justice, who died in office on January 9, 2004, had voluntarily recused himself from participation in the decision of this matter when it was docketed in this court in November 2001. The Honorable Mark Gibbons, Justice, also voluntarily recused himself from participation in the decision of this matter. Accordingly, this matter was submitted for decision by a five-justice court made up of Justices Agosti, Becker and Maupin, Senior Justice Young and District Judge Polaha.

/s/ Agosti J.
Agosti

/s/ Becker J.
Becker

/s/ Maupin J.
Maupin

/s/ Young Sr.J.
Young

/s/ Polaha D.J.
Polaha

cc: Hon. Stewart L. Bell, District Judge
Clark County District Attorney David J. Roger/
Civil Division
Jones Vargas/Las Vegas
Berger and Norton
Law Offices of Kermitt L. Waters
A. Grant Gerber & Associates
Attorney General Brian Sandoval/Carson City
Attorney General Brian Sandoval/Las Vegas
Beckley Singleton, Chtd./Las Vegas
James S. Burling
Timothy J. Dowling
Foley & Lardner
Chuck R. Gardner
Douglas T. Kendall
Kummer Kaempfer Bonner & Renshaw
Las Vegas City Attorney
Keith L. Lee
Lewis & Roca
Lani L. Williams
Clark County Clerk

DISTRICT COURT

CLARK COUNTY, NEVADA

COUNTY OF CLARK, a political subvidision of the State of Nevada, Plaintiff, vs. TIEN FU HSU; et al. Defendants.	CASE NO: A332441 DEPT. NO: VII **DECISION RE: MOTIONS FOR SUMMARY JUDGMENT**
COUNTY OF CLARK, a political subdivision of the State of Nevada, Plaintiff, vs. LISA SU FAMILY TRUST, et al. Defendants.	**DATE: 1/19/01** **TIME: 9:00 A.M.**

DECISION

(Filed Jan. 26, 2001)

The parties filed three Motions for Summary Judgment. The Plaintiff, Clark County ["Plaintiff" or "County"] filed two motions seeking summary judgment and the Defendants, [collectively the "Landowners"] filed a motion which sought summary judgment as to liability only. The Court heard oral argument as to all three motions beginning on January 12, 2001 and concluding on January 19, 2001. The Court now renders this written decision.

Positions of the Parties

Defendants

The Defendants instituted this counterclaim for inverse condemnation of the airspace over their property after the County condemned a portion of the subject property for the widening of Tropicana Avenue. In their Motion for Summary Judgment and in their oppositions to the County's two Motion for Summary Judgment, Defendants contend that their air space was taken without compensation for use by the airport. The County issued Ordinances 728 and 1221 which restricted the height of buildings over the Defendants property. Additionally, and most critically, however, Defendants allege that their property has been included in a "transition zone", which allows the invasion of their air space by air craft. This invasion of the air space renders this taking of the property, a "per se" taking. It is a per se taking because the government took the airspace for its own use. The undisputed testimony of the Airport personnel is that the reason for the height limitations on this property is due to the property's inclusion in a transition zone. The transition zones are zones that are needed by the airport to safely operate and which can be used by airplanes when other methods of approach and departure are blocked or unusable for whatever reason. While the airport personnel cannot say how often this space is invaded, they are clear that the space is necessary and that it is used. Defendants do not challenge the necessity nor the public use of their air space; however, Defendants maintain that this use results in a "taking" under the U.S. and Nevada Constitutions. As such, Defendants are entitled to just compensation for their property.

Defendants deny that this is a regulatory taking in that a regulatory taking involves only restrictions upon the use of one's property but does not allow for physical occupation of that property by another. Once a physical use is permitted, the law regarding regulatory takings is inapplicable. Since planes are allowed into the transition zones, the airspace has been invaded and the taking is per se and not regulatory.

Plaintiff

The Plaintiff has five reasons why it believe that summary judgment should be granted in its favor and why summary judgment should be denied to the Defendants. It should be noted at the start that two of the reasons had previously been ruled on and that the County had not timely requested reconsideration. As such, the rulings made in 1997 are the law of the case and are not to be revisited. These five reasons are as follows:

1. The Landowners have no standing to pursue their claim because they acquired the subject properties after the Ordinances were enacted. The County argues that the vesting in a taking occurs when the condemning agency tales [sic] possession of the Landowners' property. *Argier v. Nevada Power Co.* 114 Nev. 137; 952 P.2d 1390; (1998). The Court ruled that just compensation should be paid to the person who owns the property at the time of the taking. Since the Landowners did not own the property at the time of the ordinance, there is no taking.

2. Landowners do not have any right to the airspace. The County cites NRS § 493.050 and says that ownership is subject to the right of flight. The County insists that

this statute means that there is no right to airspace above the actual height of the building as it is being used.

3. The ordinances are constitutional on their face. Even though the Landowners do not claim any unconstitutionality, for the Landowners to win, the Court must find that the ordinances themselves amount to a taking. The Court must determine if the property has lost all economic use and whether the land use does not represent a legitimate state interest. Basically, the County argues that this is a regulatory taking case and that the test of *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978) is what the Court should employ. Here the use is legitimate as the use by the airport does constitute a public purpose. The Legislature wanted to use police power as much as possible so as to not pay compensation. The ordinances were a response to that desire. The Landowners' property is still viable. The Landowners want to skip to the fact that its current use is not its highest and best use but that is not the test. The land has economic viability and therefore no taking has occurred. Moreover, there is no interference with a reasonable investment relationship on this property. The County advises that despite the ususal [sic] need for factual inquiries in a regulatory takings case, that in a situation such as this one, where the issues are clear, the Ninth Circuit recently held that this issue may be resolved as a matter of law on a Motion for Summary Judgment. *Buckles v. King* 191 F.3d 1127, 1138-1143 (9th Cir. 1999). Therefore, this Court should grant summary judgment in favor of the County.

4. The claims are not ripe as the Landowners have not been denied the right to build. Since the Landowners have not applied for a variance, they cannot raise any claims. Additionally, the Landowners cannot remove the

airspace from their "bundle of rights". Since they continue to use the property, there is no loss.

5. The properties in question were purchased in the mid 1980's. The property was zoned T-C which had a 35 foot height limit. Today, the property is still zoned T-C with a 35 foot height limit. There was no taking. There was no application for any permit. Claimants had no existing rights to use the airspace above 100 feet.

Landowners' Response

Landowners argue that *Argier* is inapposite because this is not the case of different parties seeking the same condemnation award. Rather, the issue is whether the taking is compensable. In this case, these invisible grids and planes are so intangible that even the County does not know when the air space is being used or when it started. Standing and ripeness are not issues in this case. In any event most of the parcels were owned by related entities. Landowners point out that every jurisdiction except one has held that these airport taking cases are compensable and are per se takings, not regulatory ones. Plaintiff may condemn the airspace; however, it must pay for it. The Landowners also remind the Court that it has already ruled that the date of purchase is not relevant under federal law as the U.S. Supreme Court has allowed subsequent purchasers to bring takings claims. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982); *Nollan v. California Coastal Commission,* 483 U.S. 825; 107 S. Ct. 3141; 97 L. Ed. 2d 677 (1987). As to the issue of a "variance", it is inapplicable because this is not a regulatory taking so there is no necessity for "finality". Additionally, this Court

has already ruled that to make application would be futile especially in light of the fact that the prior owner did make application and was rejected for a 240 foot structure. Additionally, the former Airport Director, Robert Broadbent testified that he would have personally blocked any request for a variance for this property. The County fails to mention that no properties in the Transition Zone have been granted a variance.

The Legislature in NRS § 479.270 has expressly stated that payments be made for the taking of air rights. It is clear that the law acknowledges both the possession of air rights and the compensability thereof.

The Landowners emphasis [sic] that they do not argue that the Ordinances are unconstitutional on their face. Landowners do not argue that the easement is unwarranted or that the taking of the easement is not for public use. Landowners merely seek compensation for the avigation easement which the County is using for its airport operations. There is not a regulatory taking here, there is a physical invasion of the airspace. Not only can the Landowners not build but airplanes are allowed to go into the space. Physical invasion of space is a per se taking and not a regulatory one.

Landowners also note that the Courts have always held that air rights are a separate stick in the bundle of rights. These rights can be adjudicated separately. The U.S. Supreme Court has addressed air rights multiple times. *United States v. Causby,* 328 U.S. 256 (1946) made clear that air space above 500 feet is the public domain and there is no taking but the Court has also made in [sic] clear in *Griggs v. Allegheny County,* 369 U.S. 84 (1962),

that Congress could not take portions under 500 feet of airspace without just compensation.

As to the final argument that there is no taking because the use of the property is still T-C, Landowners point out that if one takes a portion of land, it does not matter if the buildings are still there. Whenever anything is taken, the zoning is not relevant except as to determining the best use of the property in ascertaining damages.

Analysis

The Court has viewed these Motions for Summary Judgment as oppositions to each other. It is clear to the Court that in order to conduct this trial, the issues for the jury must be clearly placed before them. It is also clear that the method of conducting the trial is dependent on whether this is a per se taking or a regulatory taking. Each type of taking has its own rules and procedures. The Motions for Summary Judgment show that each side believes that there is no question of material fact in determining that they should win based on their view of the case. As the County has pointed out, the Ninth Circuit in *Buckles v. King*, *supra*, has stated that the Court can decide the issue of whether there has been a taking on a Motion for Summary Judgment. The Court agrees that it is up to the court to determine whether this is a regulatory taking or per se taking. There is no doubt that the taking cannot be both and therefore, this Court must decide which type of taking has occurred.

As mentioned earlier, certain rulings such as the irrelevancy of the ownership of the property at the time of the enactment of the ordinance and of the futility of making application for variances on this property were

previously decided and are the law of the case. However, the Court will briefly address the *Argiers* issue. In *Argiers* [sic], the condemning authority sought to relieve itself of the duty to pay just compensation because the landowner had sold his property to the county prior to trial on the issue of just compensation. The Nevada Supreme Court defined the issue as follows: "The only issue this court must decide is whether the Argiers' conveyance of their land to Clark County extinguished their right to just compensation." The Nevada Supreme Court held that such a right is not extinguished. In holding that the original landowner held the right, the Court basically held as follows: (1) just compensation is always due when one appropriates property through condemnation; and (2) that between claimants to the same property, the person owning the rights at the time of the taking is entitle to the payment absent actually giving or selling the right to receive the compensation.

It appears to this court, that in *Argiers* [sic], our Supreme Court was setting priorities as between claimants. The references to *United States v. Dow,* 357 U.S. 17, 2 L. Ed. 2d 1109, 78 S. Ct. 1039 (1958) and to *Brooks Investment Co. v. City of Bloomington,* 305 Minn. 305, 232 N.W.2d 911 (Minn. 1975), both refer to priorities between claimants. *Argier* is about the priorities between claimants and not a rule that prevents a condemning agency from paying compensation because there may be other or earlier claimants. Additionally, NRS § 37.115, protects condemning agencies from multiple claimants by bifurcating the procedure and allowing the agency to obtain its judgment of condemnation and then holding a separate proceeding amongst any claimants regarding the allocation of that compensation. To read *Argier* as the County

argues confirms that a condemner need not pay just compensation if there might be disputes as to whom the award should go. It is inconceivable to this court that the Nevada Supreme Court, with its strong belief in due process and with its knowledge of takings law, would hold that a condemner can take property but never have to pay just compensation as long as the original owner was unaware of his rights.

The County argues that Landowners have no air rights above the current use because of NRS § 493.050. NRS § 493.050 states that the flying of aircraft is lawful unless the flight is below the current use of the property. The fact that a flight is lawful is not particularly useful in the context of an inverse condemnation action where the Landowners allege use of the airspace. This statute applies to property not subject to any governmental ordinance. The statute is also about the legality of flight and is meant to forestall trespass actions. The County's argument that there are no air rights are belied both by NRS § 479.270 and by the court's holding in *Penn Central*. The Legislature would not need to allow for the condemnation of air rights if none existed. Neither avigation easements nor § 497.270 would be necessary if there were no air rights. This statute anticipates that air space may need to be condemned. This Court understands that legislative bodies, the Legislature, the County Commission, and the Airport Board, desire to avoid the payment of just compensation to the extent possible by using zoning to achieve the use of the properties. However, NRS § 497.030 is the law. The operative words in this statute are "to the extent legally possible". It is for the courts to determine whether it is legally possible not to pay just compensation.

Penn Central is based on the land owners desire to build a 55 story office building above the historic Penn Central Station. The New York authorities denied the right to build as part of its Landmarks Preservation Laws. The issue itself was whether the air rights could be limited. This presupposes that air rights exist. The Supreme Court decided that air rights could be regulated in certain instances but it did not decide that no rights existed. Therefore, the argument that the Landowners cannot recover because they have no air rights above that which currently covers the existing use is without merit.

The crux of the argument in this case is whether there is a regulatory or per se taking. The County has ably stated the tests to be used in a regulatory taking in *Penn State* [sic] and in *Kelly*. In those cases, the courts found that where a public purpose exists and where the land retains an economic value, then the police power of zoning can be used to avoid the payment of just compensation. In fact, when the police power is properly used, it results in no taking at all. The Landowners do not disagree with the County's view of what the test would be if this were a regulatory taking. But the Landowners argue that use of the air space calls for a different analysis. The analysis is one found in many takings cases including amongst others, *Causby* and *Griggs, supra*. In *Penn Central,* the Court did not overrule *Causby* or *Griggs*. Also, *Nollan* and *Loretto* were both decided after *Penn Central*. In essence, despite *Penn Central,* there are a number of factors which remove certain types of regulations from the *Penn Central* analysis.

In its opinion in *Penn Central,* the Court discusses the types of takings. The final "taking" is as follows:

> "Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute "takings." United States v. Causby, 328 U.S. 256 (1946), is illustrative. In holding that direct overflights above the claimant's land, that destroyed the present use of the land as a chicken farm, constituted a "taking," Causby emphasized that Government had not "merely destroyed property [but was] using a part of it for the flight of its planes." Id., at 262-263, n.7. See also Griggs v. Allegheny County, 369 U.S. 84 (1962) (overflights held á taking); Portsmouth Co. v. United States, 260 U.S. 327 (1922) (United States military installations' repeated firing of guns over claimant's land is a taking); United States v. Cress, 243 U.S. 316 (1917) (repeated floodings of land caused by water project is a taking); but see YMCA v. United States, 395 U.S. 85 (1969) (damage caused to building when federal officers who were seeking to protect building were attacked by rioters held not a taking). See generally Michelman, supra, at 1226-1229; Sax, Takings and the Police Power, 74 Yale L. J. 36 (1964)."

Id. at p. 128.

The Supreme Court has repeatedly held that cases involving intrusions onto the land or airspace of others are different from other regulatory cases. In *Nollan, supra,* the Court points to the fact that not only is the landowner limited in his use of the property, but that the landowner is required to allow access onto his land for the benefit of the public and then holds that just compensation is required. The Court held that an essential right of ownership was the right to exclude others from the property. In

Loretto, the small metal boxes and cable wires/ waves constitute enough of an invasion to property to fall into the *Causby* type takings and require compensation.

Courts have repeatedly held that the government cannot use its legitimate police power to force a Landowner to allow others onto his property without the payment of just compensation. The Plaintiff has not disputed that the Landowners' property is not being used in its transition zone nor has the Plaintiff argued that there is no entry upon the property. The Plaintiff has many legal theories in opposition to the Defendant Landowners' Motion for Summary Judgment, but no factual ones. The Plaintiff has not disputed that aircraft do go through the airspace above the Landowners properties and that the airspace is necessary and used by the airport. In its Motion for Summary Judgment, the Plaintiff argues that it is entitled to regulate the Defendants' land because it is for the public good. In essence the Plaintiff alleges, that the Landowners not only are barred from using the airspace themselves but that the Plaintiff has allowed the airport to make use of the airspace. There is no evidence that the Plaintiff has presented that would dispute that the Landowners' property is used by the airport for the public good nor that would prevent the court from entering summary judgment in favor of the Defendants as to liability. Accordingly, this Court must find that the governmental action in this case denies the Landowners the right to use the air rights and it denies the right to exclusive possession of the air rights and it allows the airport to use the air rights of the Defendants. This results in a "per se" taking that requires just compensation.

CONCLUSION

The Takings Clause of the Fifth Amendment provides: "Nor shall private property be taken for public use, without just compensation." The aim of the Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960). The use of the Defendant's property is indeed for the benefit of the public. Pursuant to the United States and Nevada Constitutions, the Defendants need not bear the burden themselves. The Defendants' Motion for Summary Judgment as to liability is granted. The Plaintiffs two Motions for Summary Judgment are denied. Trial is set to commence on February 26, 2001 at 1:30 p.m. This court finds that the issue of liability and damages as to this condemnation case are inextricably intertwined. Therefore, this case is not appropriate for NRCP 54(b) certification.

IT IS SO ORDERED.

DATED this 26 day of January, 2001.

/s/ Mark Gibons
MARK GIBBONS,
District Judge

IN THE SUPREME COURT OF THE STATE OF NEVADA

COUNTY OF CLARK, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, Appellant/Cross-Respondent, vs. TIEN FU HSU; LISA SU FAMILY TRUST; LISA SU TRUSTEE; PETER B. LIAO; WESTPARK, INC.; LUCKY LAND COMPANY; LUCKY LAND COMPANY INVESTMENTS; LUCKY LAND COMPANY ENTERPRISES LIMITED PARTNERSHIP; AND WEST PARK COMPANY 1, Respondents/Cross-Appellants.	No. 38853

ORDER DENYING REHEARING

(Filed Dec. 23, 2004)

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Agosti, J.
Agosti

/s/ Becker, J.
Becker

/s/ Maupin, J.
Maupin

/s/ Young, Sr.J.
Young

/s/ Polaha, D.J.
Polaha

cc: Eighth Judicial District Court Dept. 7, District Judge
Clark County District Attorney David J. Roger/Civil Division
Jones Vargas/Las Vegas
Law Offices of Kermitt L. Waters
Manatt, Phelps & Phillips, LLP
A. Grant Gerber & Associates
Attorney General Brian Sandoval/Carson City
Attorney General Brian Sandoval/Las Vegas
Beckley Singleton, Chtd./Las Vegas
James S. Burling
Timothy J. Dowling
Foley & Lardner
Chuck R. Gardner
Douglas T. Kendall
Kummer Kaempfer Bonner & Renshaw/Las Vegas
Las Vegas City Attorney Keith L. Lee
Lewis & Roca
Lani L. Williams
Clark County Clerk